

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PAVAI

2010 FEB -1 PM 12:02

CLERK

BY: B. Hamilton ✓

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER

Defendant.

P1300  
No. CR 2008-1339

Division VI

**ORIGINAL**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

**BEFORE: THE HONORABLE THOMAS B. LINDBERG**  
**Judge of the Superior Court**

EVIDENTIARY HEARING  
VOLUME II (Afternoon Session)

Prescott, Arizona  
January 12, 2010  
1:30 p.m.

1 (The State was represented by  
2 Joeseeph C. Butner, III, Deputy Yavapai  
County Attorney.)

3 (The Defendant was represented by  
4 John Sears, Attorney at Law, and Larry  
5 Hammond, Attorney at Law, and Anne Chapman,  
Attorney at Law.)

6  
7 P R O C E E D I N G S

8  
9 THE COURT: I'll note a new court reporter.

01:32PM 10 Thank you, Holly, for covering. All counsel are  
11 present. Defendant's present. This is, for the court  
12 reporter's record, CR 2008-1339, State vs. Steven  
13 Democker. We're wading through various motions that  
14 have been filed. Mr. Sears.

01:33PM 15 MR. SEARS: Your Honor, to follow up on the  
16 discussions we had right at the morning break about  
17 communications with our client. I have tentatively  
18 arranged with detention staff to try and experiment this  
19 Thursday at the lunch hour to see how that works, if  
01:33PM 20 that works for the court. So if we could, on that piece  
21 of it hold off and we'll see how that goes on Thursday.

22 THE COURT: Very good. Thank you for, thank  
23 you, gentlemen, for helping with that.

24 MR. SEARS: I guess pending permission.  
01:33PM 25 They're going to have to ask their supervisors for

1 permission to change up their normal plan here.

2 THE COURT: Thank you.

3 MR. SEARS: And I meant to do it, we got  
4 back a little bit late. I was hoping we could try the  
01:33PM 5 desk shift here. Maybe we could do that at the  
6 afternoon break to see.

7 THE COURT: We can do it tomorrow.

8 MR. SEARS: Tomorrow, just to get started on  
9 that.

01:34PM 10 THE COURT: Put the defense table over here  
11 on my right, your left, and the prosecution where it  
12 normally would be at the time of the trial.

13 MR. SEARS: Thank you. And then the other  
14 thing is if the court were to inquire the state if  
01:34PM 15 they've had any success in tracking down Detective  
16 Huante, it would help where we're going.

17 THE COURT: Mr. Butner.

18 MR. BUTNER: I have spoke with him at lunch.  
19 My understanding was that we would do that on Thursday  
01:34PM 20 now, or is that correct?

21 THE COURT: That's what we were pointing to,  
22 I think.

23 MR. BUTNER: Okay. And that's what I  
24 thought, and I just spoke with him and he would be  
01:34PM 25 available then. Will we do it in the morning or the

1 afternoon?

2 THE COURT: Is that acceptable, and your  
3 preferences as far as versus morning or afternoon?

4 MR. SEARS: Well, Your Honor, I had actually  
01:34PM 5 in my mind set aside all of Thursday for the 404(b)  
6 hearing, and I had on my proposal that we would take up  
7 the Huante and then reconstructions today and I suppose  
8 tomorrow, so I still think we're going to need an entire  
9 day, perhaps, for the 404(b) hearings at this point. So  
01:35PM 10 I would ask that Detective Huante be available tomorrow,  
11 if at all possible.

12 THE COURT: You probably didn't cover that,  
13 or did you?

14 MR. BUTNER: I didn't, other than the fact  
01:35PM 15 that I said what are you doing this week and it looked  
16 like he would be available, so I wasn't real clear on  
17 Thursday absolutely being the day, so I kind of left it  
18 open and so I'll get him tomorrow, I think. That  
19 shouldn't be a problem.

01:35PM 20 THE COURT: Okay. He may or may not be the  
21 only one, and maybe he won't be at all on the 404(b)  
22 matters.

23 MR. BUTNER: Correct.

24 THE COURT: So if we can get him tomorrow,  
01:35PM 25 do you want to try for the morning on that?

1 MR. BUTNER: Sure.

2 THE COURT: Or the afternoon, Mr. Sears?

3 Mr. Sears, any preferences morning versus afternoon? Do  
4 you think he's going to, Huante's going to take all day  
01:36PM 5 for the -- I wouldn't think so for a reconstruction  
6 issue.

7 MR. SEARS: It was the state's idea that he  
8 might be necessary, Your Honor. I can't speak to what  
9 they would propose. I do remember Mr. Butner saying he  
01:36PM 10 thought it would be relatively brief.

11 THE COURT: I would expect that also, I  
12 guess.

13 MR. BUTNER: I'll see if I can get Brown  
14 too, and I'll try and have both of them for tomorrow  
01:36PM 15 morning.

16 THE COURT: Okay. We'll plan on tomorrow  
17 morning, then. Thank you for being flexible on that.  
18 Mr. Sears.

19 MR. SEARS: Thank you. Your Honor, if it's  
01:36PM 20 appropriate and acceptable to you now, I'd like to take  
21 up again the motion for jury questionnaire and the jury  
22 protocol and see if we can't drill down a bit into that  
23 so that some decisions could be made about how we will  
24 go forward on this. I made some comments to the court  
01:36PM 25 in chambers, again off the record, about our belief that

1 the sooner we can address the issues that are raised by  
2 this and the more issues we can address now, the less of  
3 a scramble this is going to seem like in April. And  
4 what we had proposed was that the court decide now that  
01:37PM 5 a questionnaire would be given, used in this case, and  
6 that the questionnaire that we proposed would be that  
7 questionnaire and that the court adopt the what we call  
8 the protocol, which is a fancy term for the schedule and  
9 methodology that we have proposed in the two previous  
01:37PM 10 meetings with you, particularly through Mr. Guastaferrero,  
11 that have a timetable and a way to obtain this  
12 information.

13 We are certainly prepared to talk about  
14 adjusting the dates in various directions, but as we  
01:38PM 15 said in December we put a considerable amount of thought  
16 into the sequencing of these events to allow enough time  
17 for the things that have to take place between each set  
18 of events to occur, again so that we're not rushed or  
19 scrambling, and all of that was done with the aim of  
01:38PM 20 actually expediting and streamlining the jury selection  
21 process by doing as much of this in advance and out of  
22 the court's presence and without involving the court's  
23 time, which sounds like it's almost nonexistent in April  
24 to devote to these matters, and so that's our proposal.

01:38PM 25 You had some questions about the logistics

1 of the questionnaires, and one of the things that you  
2 raised with us this morning was the possibility that we  
3 were going to have a hard time commandeering the jury  
4 assembly rooms here and in the Verde for an entire week,  
01:39PM 5 and I was hoping that we could at least figure out a way  
6 to anticipate that with the jury commissioner and court  
7 administration and scheduling to see if we could, A, do  
8 that, that would be a lovely thing; and if we couldn't  
9 do that, to try and find some alternative way, assuming  
01:39PM 10 that we're going to need the larger room for our  
11 projects in that week of questionnaire answering and  
12 then perhaps smaller jury panels could be assembled in  
13 the Division 2 courtroom in this building or some other  
14 place to be done.

01:39PM 15 THE COURT: All right. I think you're going  
16 to need enough room for people to fill out  
17 questionnaires if we go that route, so there's enough  
18 space, something hard, a table or the like for them to  
19 be able to write on without violating the fire code and  
01:40PM 20 things like that. Sometimes we get jury panels of I  
21 think Judge Hess, Judge Mackey on occasion in this  
22 building will start trials on Tuesdays. Judge Kiger  
23 typically has Wednesday, Thursday, Friday settings. I  
24 have Wednesday, Thursday, Friday settings. I don't know  
01:40PM 25 if Judge Jones has established a pattern with regard to

1 his trial days. I think he's usually Wednesday,  
2 Thursday, Friday also. So the crunch days more likely  
3 than not will be Wednesday as distinguished from Monday,  
4 Tuesday, Thursday or Friday. I'm even less certain of  
01:40PM 5 who has what days in the Verde, and frankly they do have  
6 some other courtroom space generally available and  
7 aren't restricted solely to the jury room over there.  
8 It's a beautiful building.

9 I have, I have currently the week of April  
01:41PM 10 5th of five cases that are set for trial. I have two  
11 cases the week of the 12th, 13th, 14th. My trials, as I  
12 say, generally start on Wednesday the 14th. One of them  
13 may be going away. I'm uncertain as to whether the  
14 other one is. The advantage to the 14th, as I did try  
01:41PM 15 to keep that fairly uncluttered, there's only one or two  
16 trials set. Obviously, cases settle and get moved and  
17 things like that, so at this point I may be able to  
18 coordinate something with you on the week of the 14th  
19 for reviewing the jury questionnaires and meeting with  
01:42PM 20 you. It kind of depends on other people and other  
21 people's trial rights, which I also have high regard  
22 for.

23 One of the -- actually, there are a couple  
24 of major concerns, as I said off the record, that I  
01:42PM 25 think a jury questionnaire would help serve to call the



1 numbers that we're ultimately dealing with, and those  
2 two primary issues as far as I'm concerned are pretrial  
3 publicity, which even now is being generated, and the  
4 issue just of the length of the trial. So I suppose  
01:43PM 5 from a standpoint of the questionnaire and what we're  
6 going to tell them about our needs for a trial, I'm  
7 going to have to nail that down a little bit more than  
8 it is right now in terms of what the proposed trial  
9 schedule might be. But those are the two major issues,  
01:43PM 10 and I recognize and understand the point that if you're  
11 going to use a jury questionnaire for those items, it  
12 may be proper to use a jury questionnaire for other  
13 items also. But those two items, plus an idea of trying  
14 to be financially frugal with limited resources of what  
01:43PM 15 the county has and frugal in terms of imposing upon  
16 citizens who come in and use their time to fill out  
17 these things. Those are the four major points that I'm  
18 interested in, I guess, I guess I would say.

19 I think that some of the costs are saved by  
01:44PM 20 using the Verde for the people that live in proximity to  
21 the Verde, and I appreciate that. I think that my time  
22 would be minimized and allowed to be devoted to other  
23 people's trials if my portion of it is videotaped, which  
24 both sides have talked about, and I think that I would  
01:44PM 25 like to cover most of the issues and probably some more

1 that are raised on the first page of your proposed  
2 questionnaire, go over those and emphasize some  
3 particular aspects of that. In particular, something  
4 that wasn't on there, not to start -- now that they know  
01:45PM 5 they might be called for a particular case, not to start  
6 doing research and that sort of thing. Have somebody  
7 screen their newspapers and have them be careful about  
8 the news programs and radio programs and that sort of  
9 thing so they -- that sort of thing that they listen to,  
01:45PM 10 so that once we have an identified panel we don't start  
11 losing folks because not that they learned something  
12 beforehand but now they start reaching concerns about  
13 it.

14 One of the things that is said in the  
01:45PM 15 preliminary part of your questionnaire on page 2 is the  
16 Wednesday through Friday schedule, and I would like to  
17 propose at least for some of the weeks, if not most of  
18 the weeks, having a four-day schedule and going Tuesday  
19 through Friday instead of Wednesday through Friday. We  
01:46PM 20 have a couple of potential holiday issues in there with  
21 Memorial Day and depending how long this goes, Fourth of  
22 July, the Fourth of July holiday. And I think because  
23 the Fourth is on Sunday that the holiday is probably  
24 Monday, although I don't know that for a fact. Does  
01:46PM 25 somebody know that already?

1 MR. SEARS: That would require a paper  
2 calendar, which is so last year.

3 THE COURT: Probably. Anyway, I expect that  
4 it's July 5th and not July 2nd, but I don't know that  
01:47PM 5 for a fact. Fourth of July is on a Sunday.

6 THE CLERK: I believe it is, Judge.

7 THE COURT: Thank you. So Independence Day  
8 being celebrated on the Monday, that would make the  
9 Tuesday that week law and motion day, so depending on  
01:47PM 10 how far out we're going with the trial, so I guess I  
11 need some input about any ideas for saving costs for  
12 doing the assembly without impairing the ability of the  
13 other divisions to do their work or me to do my work, if  
14 I have other trials going.

01:47PM 15 MR. SEARS: I have one thought that just  
16 occurred to me, Your Honor, in view of your comments  
17 about Wednesday really being the pivotal day. We could  
18 do -- we took arbitrary numbers throughout this. We had  
19 an arbitrary number of 450 jurors divided into nine  
01:48PM 20 sessions of 50. We could do Monday, Tuesday, Thursday  
21 and Friday, do two on Friday, we had done nine because  
22 we didn't want to have one on a Monday afternoon but we  
23 could go back to that.

24 THE COURT: We could probably do Wednesday  
01:48PM 25 afternoon, but if Wednesday morning people are picking

1     juries that would be the conflict.

2                 MR. SEARS:   Right.   So we had that -- we had  
3     nothing happening on Friday afternoon in our proposal so  
4     we could write Friday afternoon back in or we could say  
01:48PM 5     eight sessions of 60.

6                 THE COURT:   Yeah.

7                 MR. SEARS:   There's no magic to 50.   I think  
8     Margaret told us last time that this jury assembly room  
9     could hold a hundred and some people and you talked  
01:49PM 10    about tables, and so if you cut that in half I'm sure  
11    you could get 60 people in tables --

12                THE COURT:   I expect you could.

13                MR. SEARS:   -- here, and I took a peak the  
14    last time I was in the Verde and the door was locked but  
01:49PM 15    I looked through the window, and it looks to me like the  
16    jury assembly room over there is at least as large if  
17    not larger.

18                THE COURT:   Larger.

19                MR. SEARS:   And it doesn't have offices and  
01:49PM 20    Coke machines.

21                THE COURT:   It has Coke machines but they're  
22    off to the side.

23                MR. SEARS:   Couldn't see them.

24                THE COURT:   The part where you would seat  
01:49PM 25    the public has capability of, as I understand it, of

1 projecting information onto the -- onto a screen or the  
2 wall, I forget which. I think they had screens and  
3 stuff. As I say, it's a nice setup.

4 MR. SEARS: It looks pretty slick.

01:49PM

5 THE COURT: But they do have a place for  
6 coffee and Coke machines and stuff like that, but it's  
7 off to the side so you probably couldn't see it from the  
8 angle where it was closed.

9 MR. SEARS: Going back to your comments

01:50PM

10 about the cost effectiveness and the Verde, we had  
11 mentioned last month that we thought that the benefit of  
12 asking jurors to come in to fill out the questionnaire,  
13 to be certain that we were getting their undivided  
14 attention and only their answers outweighed the

01:50PM

15 inconvenience, and then particularly if we're going to  
16 be asking for jurors to sit in a lengthy trial,  
17 particularly for the Verde residents, a lengthy trial in  
18 Prescott if they had a problem devoting a couple of  
19 hours on a weekday filling out the questionnaire that

01:50PM

20 would be a significant factor in determining whether  
21 they really had the ability to come for day after day to  
22 sit through a trial, for entire days to sit through a  
23 trial. So I, yeah, it's an inconvenience, but

01:50PM

24 considering the benefit to the system and the benefit to  
25 the court and to the defendant in this case of getting

1 the true answers from these individuals, I think it's a  
2 task worth taking up. I do think, Your Honor, and you  
3 said these same things in much the same way last month  
4 about the parts of the questionnaire that you thought  
01:51PM 5 were important.

6 THE COURT: At least I'm consistent.

7 MR. SEARS: And at least I remember, which  
8 is not always the case. We think that the questions  
9 about the death penalty part of this case are every bit  
01:51PM 10 as important as the hardship questions and the pretrial  
11 publicity weeks.

12 THE COURT: It speeds it up; I grant that.  
13 There's so much information that you're asking about  
14 would speed up analysis by the parties of whether they  
01:51PM 15 should exercise challenges for cause or preemptory  
16 challenges.

17 MR. SEARS: I don't think there's any  
18 substitute, Your Honor. In our collective experience  
19 trying capital cases in state and federal court, for  
01:51PM 20 having questionnaire answers in advance to evaluate  
21 before the capital part of the voir dire is conducted  
22 with jurors, it is a way to understand going in much  
23 about their attitudes about the death penalty. But my  
24 further evaluation of that is that there is no --  
01:52PM 25 ultimately, no substitute for face-to-face voir dire's,

1 as Mr. Butner suggested, I agree with that, but I do  
2 think voir dire with questionnaires in hand is the best  
3 of both worlds on that. I do think to the state's  
4 skepticism to the contrary that we will find these  
01:52PM 5 questionnaire answers will allow us to agree that there  
6 are certain jurors whose positions are so extreme that  
7 there is no point in even bringing them into court, that  
8 they're excludable by one side or the other with no real  
9 basis for opposition.

01:53PM 10 I've done it before in cases where I didn't  
11 have a feeling going in that we were necessarily going  
12 to do that, and I was surprised somewhat by the  
13 immediate meeting of the minds on some of these answers.

14 As I said before, people are now talking  
01:53PM 15 about it, thinking about it, expressing themselves about  
16 the death penalty in ways that weren't done years ago.  
17 For some reason it has become a matter of public  
18 conversation. People do have attitudes and are not at  
19 all shy about expressing them. And so I think in  
01:53PM 20 addition to speeding up the in-court process, I believe  
21 there will be a weeding out of jurors who could not sit  
22 in this case by agreement. I expect that to happen, and  
23 that's the mindset that we would bring to those  
24 discussions with the state, that we see no benefit at  
01:54PM 25 all to engaging in some futile attempt to rehabilitate

01:54PM

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1 some juror from: I would never vote for the death  
2 penalty under any circumstances ever; back into  
3 acceptability. And I would expect that the state would  
4 agree that somebody that says that death is the only  
5 penalty for first degree murder could never be seated on  
6 a jury. So those are the reasons why we think those  
7 questions that are in our proposed questionnaire are  
8 really important to this process. And I'd like to know  
9 when you're ready to tell us that, if not this precise  
10 questionnaire, some close version of it is going to be  
11 used so that we can start making the plans for that  
12 process, and then if we can look at those dates or again  
13 some close version of those dates to plug in, all of us  
14 can make plans for the work that has to be done to be  
15 ready for that process.

16 And we have said that we would help out  
17 whenever possible logistically. For example, picking up  
18 the Verde questionnaires and doing things to assist the  
19 jury to inform court staff to make sure they're not  
20 working after hours and doing things and distributing  
21 them to the County Attorney's office. We can do a lot  
22 of those things to try and make that part of it simpler;  
23 photo copying, things like that.

24 THE COURT: I did notice that you seem to  
25 have cut down the original. Although, I think we're



1 still at 17 pages or so. For example, by taking out the  
2 lists of names of potential witnesses, or at least  
3 that's -- I think that's a change that I noted.

4 MR. SEARS: Partly because we don't have  
01:56PM 5 such a list.

6 THE COURT: And that's what I was wondering  
7 about. To what extent, are you any more certain now  
8 about the number of days for the trial that I should lay  
9 aside, than the 30 or so that was estimated at one time  
01:56PM 10 in the past?

11 MR. SEARS: I don't, from our point of view,  
12 we don't have a better number than that today. But in  
13 many ways we're not in control of how long the state's  
14 case takes.

01:56PM 15 THE COURT: Mr. Butner, any insights into --

16 MR. BUTNER: Not at this time, Judge.

17 THE COURT: -- whether there's been any  
18 identification of what witnesses you're going to call  
19 and not call?

01:56PM 20 MR. BUTNER: Well, there has been an  
21 identification to some extent, but I haven't had  
22 opportunity to make further identification since the  
23 last time that we spoke.

24 THE COURT: So we're still dealing with  
01:57PM 25 something on the order of 30 days or so. If I went, I

1 think if I went four days a week, and already I know  
2 that there's a problem with doing that because of  
3 Memorial Day, but if I went four days a week, that takes  
4 us through the 24th of June from May 4th, and I don't  
01:57PM 5 know if the 30 days that you're talking about is  
6 inclusive of the jury selection part of the process.

7 MR. SEARS: Or a possible penalty phase.

8 THE COURT: Oh, I know it doesn't include a  
9 possible penalty phase, or at least I assumed that  
01:57PM 10 you're not including a possible penalty phase.

11 MR. SEARS: When we picked that number long  
12 ago we were talking, I thought, about our trial days and  
13 possible penalty phase.

14 THE COURT: Not including jury selection, or  
01:57PM 15 do you think that that's -- I know how hard it is to  
16 estimate these things. I do.

17 MR. SEARS: Here's something we thought  
18 about. If you were to tell the jury that all phases of  
19 the trial might last through the month of July, then we  
01:58PM 20 have three plus months, well, we have almost three  
21 months. We have --

22 THE COURT: Yeah.

23 MR. SEARS: -- or maybe just even three  
24 months. That may be more realistic and would wrap up  
01:58PM 25 and include jury selection and a possible penalty phase.

1 The state has said a number of times that their part of  
2 the penalty phase might not include any new evidence or  
3 witnesses, so that might shorten that portion, if we  
4 ever for some reason got there, and we've talked about a  
01:58PM 5 jury selection process that has an end date and I think  
6 that end date is overly pessimistic. I think we may  
7 have a jury in advance of that.

8 THE COURT: So at least the fourth week of  
9 trial would have to be a three-day rather than four-day,  
01:59PM 10 I think. And frankly I'm wondering if I should have, in  
11 order to be not totally neglectful of my other cases and  
12 have some place to put hearings that are necessary, have  
13 a few Tuesdays in there, that would let me work on  
14 things other than this case.

01:59PM 15 All right. Mr. Butner, I know that we've  
16 discussed this before and have a general notion of some  
17 of your thoughts from the last time we discussed this,  
18 about whether we should or should not have a jury  
19 questionnaire, but any input that you want to give on  
02:00PM 20 just the general concept? Any proposals that you have  
21 for cost savings or logistics?

22 MR. BUTNER: Well, Judge, in terms of the  
23 jury questionnaire, I think that the appropriate areas  
24 of inquiry that can really help us would be the area of  
02:00PM 25 hardship to the jurors, that being the length of the

1 trial, and of course their personal circumstances, so to  
2 speak, that would prevent them from being a juror, and  
3 then pretrial publicity. Those areas seem to make sense  
4 to me. I think that -- I don't think that it's  
02:01PM 5 appropriate to inquire at length. In fact, I would  
6 prefer not at all concerning the death penalty. I have  
7 witnessed people say one thing and then they explain,  
8 well, that isn't really what I meant, you know, and you  
9 end up with a, as we described it, as a rehabilitated  
02:01PM 10 juror so to speak. I think that the jury questionnaire  
11 in some instances has a tendency to crystalize potential  
12 juror's attitudes when they really don't understand the  
13 situation and the circumstances under which they would  
14 be called to make these kinds of decisions, and I think  
02:01PM 15 it's better that we don't explore those kinds of things  
16 by way of a questionnaire but rather we do them in  
17 person. So in answer to your question, I think that  
18 logistically is going to simplify if it were -- if the  
19 court were to adopt my suggestions in that regard. It  
02:02PM 20 would certainly simplify the questionnaire process. The  
21 questions that the jurors would be answering would be  
22 related to whether they have this kind of time in their  
23 life to devote to this sort of situation without extreme  
24 hardship, and then -- and then whether they've heard any  
02:02PM 25 pretrial publicity about it.

1 THE COURT: Doing the jury questionnaire,  
2 assuming the Clerk's office pays mileage, I think the  
3 mileage rate is something like 35, 40 cents per mile  
4 now. Obviously, if we do jurors in the Verde that go to  
02:03PM 5 the Verde branch of the Superior Court, the Verde  
6 district facility in Camp Verde, we'll recognize some  
7 cost savings there versus people coming from Bagdad,  
8 Congress, Seligman to Prescott or from the Verde, for  
9 that matter, to Prescott.

02:03PM 10 I think that where the biggest costs are, if  
11 the clerk's office pays the jury mileage, it's going to  
12 be in that first phase of the process because that's  
13 when we have the most people. I don't know that if we  
14 do a jury questionnaire there's any realistic way of  
02:03PM 15 getting them to fill it out unless we have them actually  
16 come. But the mileage part of it is the biggest,  
17 biggest cost, I think, from the Clerk's office  
18 perspective or the Jury Commissioner's office  
19 perspective.

02:04PM 20 In a trial, trial jury fees obviously are an  
21 expense but you're dealing with a more compact number of  
22 people, only 16 or so people, and I don't know what kind  
23 of monies are in the -- and one of the things not  
24 mentioned at the hardship part of the proposed jury  
02:04PM 25 questionnaire that Mr. Sears, you had, was the potential

1 availability of a lengthy trial fund for those who may  
2 have some financial difficulties. I don't know how to  
3 get really past that concept over to people and let them  
4 know, because there's a certain level of uncertainty in  
02:04PM 5 how much funding there is in the system and how much  
6 money they would wind up actually getting paid above and  
7 beyond the royal gratuities of \$12 a day or whatever  
8 they get for the shorter length trials.

9 I don't think that you're going to get  
02:05PM 10 enough feedback in from sending them a jury  
11 questionnaire and a summons and expecting them to fill  
12 it out and return it without the dangers of having  
13 somebody else filling it out for them, getting responses  
14 that are not their own responses, that are responses by  
02:05PM 15 somebody else, and the danger of having them start doing  
16 research and obtaining some bias or prejudice as a  
17 result of researching and doing information gathering  
18 about what the case is all about. So I'm uncomfortable  
19 from the cost standpoint, but I'm more comfortable from  
02:06PM 20 the practicality aspect of having them come into one of  
21 the courthouses and fill this out in person. The timing  
22 of it conceptually isn't bad. I'm wondering if we ought  
23 to go the preceding week, but I'm no better off the  
24 preceding week. In fact, I'm worse off. I have I think  
02:06PM 25 six trials, one of which is a lengthy trial that

1 probably is the actual one that I'm going to be doing.  
2 So I'm no better off, and probably, although probably I  
3 would, if that case is going, I probably wouldn't  
4 personally be doing jury selection on the 31st of March  
02:06PM 5 if we went back a week.

6 MR. SEARS: There's nothing magic about  
7 April 5th except this, Judge, that what we were trying  
8 to do was to bracket the May 5th start date with a  
9 proceeding so that there would be enough time in between  
02:07PM 10 without being rushed to evaluate the questionnaires,  
11 rule on the stipulated strikes and any strikes that the  
12 court felt it could make from the questionnaires, and if  
13 necessary summon another group of jurors in if we  
14 somehow dropped below the 125 that we think we need to  
02:07PM 15 have come to court on May 5th to get a jury.

16 THE COURT: And not having too much time for  
17 them to start doing things that might concern us.

18 MR. SEARS: That was the other piece of it,  
19 absolutely.

02:07PM 20 THE COURT: Yeah.

21 MR. SEARS: That we wanted to just have a  
22 flow to this that didn't push the system too hard, that  
23 didn't bring people in and then much, much later say,  
24 okay, now is your time to come in and be on the jury, to  
02:08PM 25 sort of keep it all in a relatively compact period of

1 time.

2 THE COURT: Do you want to, recognizing what  
3 Mr. Butner's saying, do you want to go through the  
4 proposal and see if there's any language cleanup things  
02:08PM 5 that you want to address, Mr. Butner?

6 MR. BUTNER: Certainly.

7 MR. SEARS: On the questionnaire?

8 THE COURT: Mr. Sears? Yeah.

9 MR. SEARS: On the questionnaire itself, let  
02:08PM 10 me -- I'll have to get a copy of it. If I could have  
11 just a second. Yeah, I have it, Your Honor.

12 THE COURT: Page 1, first paragraph, I think  
13 I would want to add something in there about, and maybe  
14 in full about not doing any research, investigation,  
02:09PM 15 visiting the scene themselves prior to our selection of  
16 the jury or afterwards if they are selected as a juror.

17 MR. SEARS: Okay. And you know, one of the  
18 other things that we've thought about is that there may  
19 not be any substitute for having you in the video look  
02:09PM 20 right into the camera and tell the jurors the same  
21 thing, if you want to emphasize that.

22 THE COURT: With my glasses hanging down  
23 over my nose, yeah.

24 MR. SEARS: Wagging a finger at them.

02:09PM 25 THE COURT: As firm as I can.



1 MR. SEARS: I think that's a good  
2 suggestion.

3 THE COURT: Any other issues that you saw  
4 with the preliminary information, I like the emphasis of  
02:10PM 5 don't write on the back side of it because we're not  
6 going to -- if we have to look at every page on the back  
7 side, we're, it's going --

8 MR. SEARS: Maybe that could go in the third  
9 paragraph.

02:10PM 10 THE COURT: It's going to slow down the  
11 process. Yeah, I agree. Maybe that goes, maybe it's  
12 important that you respond to every question but do not  
13 write on the back side of the pages of the  
14 questionnaire, because if we're looking for a bit of  
02:10PM 15 speed in doing the copying and such to the counsel.

16 MR. SEARS: Sure.

17 THE COURT: I'm not sure that we're going to  
18 want to have whoever's obligated to do that turn each  
19 page over to make sure they didn't miss anything.

02:10PM 20 MR. SEARS: We've actually, now that I look  
21 ahead, we've put underlines on page one of the bottom:  
22 Do not write on the back side of the pages.

23 THE COURT: Yeah, and maybe it's good  
24 because it's at the last part of the page.

02:11PM 25 MR. SEARS: Maybe we can put that in bold.

1 THE COURT: Yeah. On the first page. Any  
2 other issues that you want to have addressed,  
3 Mr. Butner?

4 MR. BUTNER: Judge, it seems to me if we're  
02:11PM 5 going to do this, probably the part where it says, "It's  
6 very important that your answers be your own individual  
7 answers," we might want to start with that, and then  
8 thereafter all answers being their own individual  
9 answers.

02:11PM 10 THE COURT: Any problem with that,  
11 Mr. Sears?

12 MR. SEARS: Using some of the -- just moving  
13 the language we have in there, now we're adding  
14 something. I'm open to suggestions for sure on where  
02:11PM 15 and what again, we have the underlined stuff about  
16 filling it out yourself. I mean, if you want to add  
17 another clause or sentence to that saying we just want  
18 your answers, not your spouse's or your children's.

19 THE COURT: Or at the end of the -- at the  
02:12PM 20 end of the first paragraph: We need your answers, not  
21 those of anyone else.

22 MR. SEARS: Okay.

23 THE COURT: Language to that effect. I'm  
24 not --

02:12PM 25 MR. SEARS: I don't think you can say that

1 too many times.

2 THE COURT: Yeah, yeah. Some people may  
3 take offense at that, but if it gets the point across,  
4 I think that's more important than not offending.

02:13PM

5 MR. BUTNER: So is that going to be in  
6 paragraph one or paragraph two, Judge?

7 MR. SEARS: I was thinking paragraph two,  
8 after you are sworn, the bolded sentence that says we  
9 are looking for indeed your individual answers to these  
10 questions or your complete answers, and then --

02:13PM

11 THE COURT: Then your line about: It's  
12 essential that your answers not be influenced by the  
13 opinions of others.

14 MR. SEARS: Yeah, you could leave that.

02:13PM

15 THE COURT: I like that too.

16 MR. SEARS: Okay.

17 THE COURT: Anything else on the first page?  
18 Any suggestions?

19 MR. BUTNER: No, not from the state.

02:13PM

20 THE COURT: What I'll have you do is make  
21 the changes and then present a copy back to me, and I'll  
22 see if there's anything that needs editing from my  
23 perspective after any additional input I get from the  
24 state.

02:14PM

25 So this is a draft, but I'd like to get

1 going on it as soon as we can. You say Wednesday  
2 through -- Wednesday through Friday. I think that,  
3 let's add some flexibility to it. I'd like to say  
4 Tuesday or Wednesday through Friday, and basically from  
02:14PM 5 9:00 a.m. to 5:00 p.m., and on the preliminary matters  
6 where it should start, I agree, May 4th, 2010, but I  
7 suppose if people start blocking out their time, they  
8 may not be called in on May 4th but rather on May 5th  
9 and that sort of thing. So maybe we should say about

02:15PM 10 May 4th, and the end of the case will depend on  
11 circumstances that cannot always be anticipated but we  
12 expect that this will take possibly through the end of  
13 July. And we'll also, you know, it says also break on  
14 the following days. Well, there aren't any holidays, I  
02:15PM 15 mean Monday holidays, so we're not going to be having  
16 court.

17 MR. SEARS: What about the judicial  
18 conference?

19 THE COURT: There isn't one this year.

02:15PM 20 We're still obligated to get our 16 hours but by hook or  
21 by crook, I guess. There is a proposal in Yavapai  
22 County that our judges simply go to the bar convention,  
23 but we're actually just having a judge's meeting this  
24 afternoon at 4:00, so I guess we'll discuss that, among  
02:16PM 25 other things.

1 MR. SEARS: You could invite the other  
2 judges to watch part of this trial for their credits.  
3 Just a thought.

02:16PM

4 THE COURT: I don't know if the chief  
5 justice would approve that. Anything else in  
6 preliminary matters that you think ought to be there? I  
7 think we -- I probably would scratch the part about  
8 breaking on particular other days, because I didn't  
9 point, I don't -- I wouldn't break these proceedings to  
10 go to the bar convention. I don't know about you folks.  
11 Do you want a break to go to the bar convention?

02:17PM

12 MR. HAMMOND: No. Let me speak for  
13 Mr. Sears on this, we do not want a break to go to the  
14 bar convention this year.

02:17PM

15 THE COURT: Mr. Butner, I presume the same  
16 for you.

17 MR. BUTNER: No.

02:17PM

18 THE COURT: Thank you. I appreciate that  
19 desire on everybody's part to try and get this  
20 accomplished. Anything else on preliminary matters,  
21 Mr. Butner?

22 MR. BUTNER: Nothing further, Your Honor.

02:17PM

23 THE COURT: Case summary. I need to do  
24 something to determine what if anything they know about  
25 it so that they can answer the other questions. Do you

1 have any questions, Mr. Butner, with regard to the  
2 wording use?

3 MR. BUTNER: I think that's okay, Judge.

4 On the substantial hardship part of the  
02:18PM 5 questionnaire at page 3.

6 MR. SEARS: I just had an editorial thought.

7 THE COURT: Okay.

8 MR. SEARS: And I have been in cases in  
9 which both of these procedures are followed. Sometimes  
02:18PM 10 just like with jury instructions the judge will say  
11 there shouldn't be topic headings and the questions  
12 should just flow one into the other. Other times judges  
13 have thought it was wise to alert the jury that these  
14 questions are about substantial and unacceptable  
02:18PM 15 personal hardship, and I don't have a strong position  
16 either way. We put the topic headings in there if that  
17 was your inclination to go that way, but if you say that  
18 they're not necessary or they're somehow confusing,  
19 we're not violently opposed to taking those out.

02:19PM 20 THE COURT: You read me, I suppose,  
21 properly. I would prefer them, I think. Mr. Butner,  
22 what's your -- do you have any particular position on  
23 that?

24 MR. BUTNER: Judge, I think it's probably  
02:19PM 25 not a good idea unless it's something along the lines of

1 simply saying "personal hardship" rather than saying  
2 "substantial and unacceptable," and then the other one  
3 says: Whether or not you believe hardship may prevent  
4 you from being able to serve, you know, you must  
02:19PM 5 complete the rest of the questionnaire.

6 THE COURT: I suppose I'm -- I don't know  
7 that we need "and unacceptable" but "substantial  
8 personal hardship."

9 MR. SEARS: The reason we put that in is  
02:20PM 10 that's case law, I believe, and it comes from cases  
11 talking about the propriety of excusing people for just  
12 substantial hardship if it doesn't rise to the level of  
13 being unacceptable, because everybody would say it's a  
14 hardship.

02:20PM 15 THE COURT: And everybody will say it's a  
16 hardship.

17 MR. SEARS: Sure.

18 THE COURT: The question is whether it's  
19 substantial, and that's in --

02:20PM 20 MR. SEARS: The point is to try to emphasize  
21 to the jurors that there is a bar for them to chin to  
22 convince the court that they have an unacceptable and  
23 substantial personal hardship that would disqualify  
24 them.

02:20PM 25 THE COURT: Yeah, I'm familiar with some of

1 that case law.

2 MR. SEARS: Thank you.

3 MR. BUTNER: So am I, Judge, but that's  
4 exactly my point. I think that what we want them to do  
02:20PM 5 is ask them to describe their hardship for us, not let  
6 them know what the bar is or that there is a bar, but  
7 rather we just get an accurate statement of what their  
8 hardship is and then the court determines whether that's  
9 substantial enough to eliminate them as a juror.

02:21PM 10 MR. SEARS: Like I said, we're on the fence  
11 on this one too, Judge.

12 THE COURT: I think I also want to discuss  
13 with the powers that be that have a finger on the pulse  
14 of the finances of the state, the county, and the  
02:21PM 15 lengthy jury trial fund whether there are any funds in  
16 there that haven't been swept or aren't proposed to have  
17 been swept by the legislature.

18 MR. HAMMOND: Judge, could I ask about that?  
19 I must say that I wasn't aware that there was such a  
02:21PM 20 fund, and if there is, I'm sort of flabbergasted that  
21 it's not something that we've heard about before, but it  
22 would be good I think for all of us to know if there are  
23 funds there and under what circumstances jurors could  
24 qualify.

02:22PM 25 THE COURT: As I say, given the current



1 financial circumstances of the state, I'm not sure to  
2 what extent they have funds in there and whether they're  
3 in danger of being swept between now and the close of  
4 the fiscal year by the legislature.

02:22PM

5 MR. SEARS: Did the governor mention it  
6 yesterday in her speech? If she did, I didn't hear it.

7 THE COURT: I didn't notice it. So if there  
8 are funds that may be available, basically it kicks in I  
9 think on the 6th trial day, potentially. You know,

02:22PM

10 there's a voir dire question that goes along with that,  
11 normally, that there may be funding for jury pay beyond  
12 the normal amount based on the lengthy jury trial fund,  
13 but let me do some checking before I have anything  
14 changed in that.

02:22PM

15 At this point I suppose I'll consider  
16 whether we should have the title or not. I'm kind of  
17 leaning toward having a title for this particular  
18 section, just to key them into what we're asking for.  
19 That doesn't mean that I'll find it substantial and  
20 unacceptable if they state a reason for why they think  
21 they have a hardship, but I think we need to know the  
22 information. So in terms of the topic headings of the  
23 various questions, Mr. Butner, any particular that you  
24 have issue with?

02:23PM

25 MR. BUTNER: You mean in the entire

1 questionnaire?

2 THE COURT: No, in the substantial and  
3 unacceptable personal hardship section.

02:24PM

4 MR. BUTNER: Yes. I don't think, if I  
5 understand your testimony -- understand your testimony,  
6 understand your question, Judge, for example, the next  
7 heading, is that what you're saying?

02:24PM

8 THE COURT: No, I'm saying do you have any  
9 problem with the questions one, two, three, four, five,  
10 six?

11 MR. BUTNER: Oh, just the questions  
12 themselves. I don't think so, at least for the first  
13 bunch.

02:24PM

14 THE COURT: Kind of keys them into personal,  
15 financial, professional, health issues.

16 MR. BUTNER: Right. The first bunch I don't  
17 have a problem with any of those.

02:24PM

18 THE COURT: Travel plans, whether they get  
19 paid hourly or whether the employer pays them, child  
20 care, senior adult care.

21 MR. BUTNER: Right.

22 THE COURT: Things like that. Okay.

23 MR. BUTNER: Right. I don't have a problem  
24 with that.

02:24PM

25 THE COURT: Question number nine -- eight,

1 or nine on the next page?

2 MR. BUTNER: I'm okay with those.

3 THE COURT: Then it gets into just general  
4 sorts of things, and I suppose that's where we may have  
02:25PM 5 a divergence of viewpoint as of the need to lengthen  
6 this. But obviously some of it's just check-off kind of  
7 information; age, gender, where they live in terms of  
8 the county or city or town, presumably, if that makes a  
9 distinction between living out in the county versus in a  
02:25PM 10 municipality as distinguished from Maricopa versus  
11 Yavapai County or something like that.

12 MR. BUTNER: Right. I think 14 and 15 are  
13 objectionable.

14 THE COURT: Mr. Sears, what about length of  
02:26PM 15 residence, whether they own, or rent, or live with  
16 family, friends?

17 MR. SEARS: Your Honor, in my particular  
18 experience, understanding just a little bit about an  
19 individual's background in this area, are they new to  
02:26PM 20 the area, have they been here for a very long time, if  
21 they're homeowners or renters, gives you a little bit of  
22 early insight into some attitudinal issues about Yavapai  
23 County, and Arizona, and those kinds of things. I would  
24 expect we're going to see lots of people who have been  
02:26PM 25 here a relatively short period of time, but in my mind

1 there's a distinction in juror makeup and this sort of  
2 zeitgeist of the individual based on whether they've  
3 been here forever or just got here yesterday.

02:27PM 4 THE COURT: You need another box if we leave  
5 15 in for the living with family, friends.

6 MR. SEARS: Yes, you're right. We do. It's  
7 a design problem.

02:27PM 8 THE COURT: 16, similarly. I always get  
9 nervous when we get into Batson areas, of course. 17  
10 has some of that. What's your reason for needing that?

02:28PM 11 MR. SEARS: I think we're entitled to know  
12 about the ethnic makeup of the jury, their limits on  
13 questions. But I think, if I'm not mistaken, the basic  
14 information that needs to get on five-by-seven cards  
15 have ethnicity information on it, which means they've  
16 been asked by the Jury Commissioner for that  
17 information. I can think of a thousand places where  
18 you're asked to provide that information on a regular  
19 basis and I think it's important to understand these  
02:28PM 20 issues. Even though we have a Caucasian defendant, a  
21 Caucasian victim, there may be some Batson issues in  
22 this case. There may be some racial issues in this  
23 case.

02:28PM 24 THE COURT: Talk to me about them. What are  
25 they?

1 MR. SEARS: For example, if we had a jury,  
2 and it ties in with the state's previous portrayals of  
3 Mr. Democker as being a privileged person and a wealthy  
4 person, people from lower socioeconomic class or people  
02:28PM 5 of a particular ethnicity may harbor bad feelings about  
6 wealthy white people, to be perfectly blunt about it,  
7 and may have some kind of reverse discrimination.

8 These are factual questions designed to  
9 produce possible attitudinal issues in this case.

02:29PM 10 There's nothing intrinsically important about it, but it  
11 simply gives us a more complete profile of people. And  
12 remember, we're doing this from a questionnaire. We're  
13 going to see these people, perhaps, down the road and  
14 make lots of other assessments about them, but this is a  
02:29PM 15 way to get some baseline information about them in terms  
16 of their stability, their economic level, and those  
17 kinds of things that are part of this attitudinal  
18 evaluation Mr. Guastaferro told us about here, the same  
19 thing with death penalty questions. If the court's  
02:29PM 20 mildly offended by it, that's the last thing in the  
21 world we have in mind here. We just think it's part of  
22 the profile.

23 THE COURT: Well, I'm not sure that race or  
24 ethnicity tells you a lot about the kinds of issues  
02:30PM 25 that --

1 MR. SEARS: Not in a vacuum. I would be the  
2 first to agree with you on that, Your Honor, for sure.  
3 But as part of a cross-section of questions that produce  
4 lots of things, it's just one piece of the story. You  
02:30PM 5 know, we'd be the last people to say you can tell  
6 anybody about somebody based on their race. That's the  
7 farthest thing from my mind, but it just seems to be  
8 part of the overall picture, and I just thought it  
9 belonged in here because it's information I think they  
02:30PM 10 have to give the jury commissioner.

11 THE COURT: I'm not sure that they still do.  
12 Mr. Butner, what about any of the questions 10 through  
13 18?

14 MR. BUTNER: Well, Judge, I indicated I  
02:30PM 15 don't like 15, 16 and 17. Is it 14? Yeah, 14, 15 and  
16 17. Seventeen as the court has --

17 THE COURT: You're okay with 16?

18 MR. BUTNER: Yeah, 16 I think is fine. I  
19 guess in a way it's sort of the way that Mr. Sears  
02:31PM 20 phrases it. It's kind of, well, do we want people that  
21 have lived here a long time, or not; do we want people  
22 that own or rent, or not; do we want Hispanic people, or  
23 not. I mean, I just don't think that those are the  
24 proper kinds of questions that we should be, at least at  
02:31PM 25 this preliminary stage, I don't think we should be

1 asking those questions in a screening questionnaire, so  
2 to speak, of potential jurors. There's Batson issues,  
3 and then there's issues that seem to indicate that we're  
4 discriminating against people for various other sorts of  
02:31PM 5 socioeconomic reasons.

6 MR. SEARS: Judge, maybe I didn't adequately  
7 explain our thinking here. We did not see these  
8 questions as forming the basis for some sort of single  
9 shot, single issue, a basis for excluding people. What  
02:32PM 10 we were trying to do was create through cumulative  
11 information gathering a more complete profile than we  
12 used to get from the incredibly brief computer printouts  
13 that had, and I'm remembering now looking at those  
14 printouts and they would say: Own, rent, that was a  
02:32PM 15 question. How long. I'm sure those were questions that  
16 got spit out on those printouts that we would all get  
17 the morning of jury selection cases on. And to my mind  
18 asking this information, particularly in a sequence  
19 where you're just asking simple objective information  
02:32PM 20 before you start getting into the subjective attitudinal  
21 questions, should be pretty comforting to people.  
22 People fill out these questionnaires all the time and  
23 are simple. They're simple questions. They're not  
24 prying. They're not prying; they're not offensive in  
02:33PM 25 themselves. And I think Mr. Butner's right, we wouldn't

1 want a jury of only people that lived here a long time  
2 or people that owned their own homes. It's just a piece  
3 of the total makeup of each prospective juror, and if  
4 this is an opportunity to gather information, this is  
02:33PM 5 information that we would ask people in court. And  
6 again, one of the purposes of doing this questionnaire  
7 is to do it on their time and not on the court's time.

8 THE COURT: Well, I guess out of all of  
9 them, the 17 one is the one that I have some issue with,  
02:33PM 10 I guess. So if you can live without asking that one, I  
11 think the screened questionnaire you'll be able to see  
12 at least of course the makeup of the person who comes  
13 in, at least have some basic idea of who you're dealing  
14 with. You don't get the spouse's ethnic makeup, though.  
02:34PM 15 Do you want to try to persuade me any different, or?

16 MR. HAMMOND: John, could I make a  
17 suggestion here. Some of this is really borne of the  
18 work that our consultant Joe Guastaferrero's done over the  
19 years, and I think maybe on a couple of these that are  
02:34PM 20 troubling the court, if we could just say that we  
21 understand the court's direction in this area and that  
22 subject to giving us a day or two to talk to our  
23 consultant and if there are other reasons that persuade  
24 him that a particular question is important, we might  
02:34PM 25 advise the court either tomorrow or before the end of



1 this week.

2 THE COURT: All right. I think that 24 is  
3 of a similar nature, but we frequently ask about prior  
4 military service. So I don't have the same perspective  
02:35PM 5 as I do when you start getting into Batson type issues  
6 that really are of greater concern to me.

7 The general information on page 5 in  
8 particular with the identifying connections with law  
9 enforcement and over to page 6 for the same purposes,  
02:35PM 10 law school, working for defense folks, working for  
11 prosecution folks, none of that is particularly  
12 offensive. I think it could speed up some of the later  
13 information that we do in voir dire. So if you have  
14 these answers, unless there's something confusing about  
02:36PM 15 it, I'm not going to want you to go back to the same  
16 kinds of questions when we go to the voir dire process.

17 On page 7 victims rights, prisoners  
18 circumstances. Maybe there ought to be a prisoners  
19 rights organizational, oh, I guess you do have that as  
02:36PM 20 part of 30.

21 Mr. Butner, other information that you have  
22 objections to through, let's go through number 30.

23 MR. BUTNER: I guess my main objection, if  
24 you would, Judge, is that all of this is overly  
02:37PM 25 burdensome for the jurors right upfront in this case

1 with this kind of in-depth questioning about their  
2 background. I mean, typically we have, if the court  
3 will recall, and I haven't even got it in front of me,  
4 but typically we just say: Do you or any members of  
02:37PM 5 your family, are they involved with law enforcement and  
6 that kind of thing and then we go from there. Well,  
7 we've got a much more in-depth questionnaire going here,  
8 and I thought the whole purpose of this basically was to  
9 kind of screen these jurors preliminarily and not get  
02:37PM 10 into an in-depth type of situation with them, that that  
11 would be reserved for voir dire once they came in.  
12 Maybe I'm mistaken on that.

13 THE COURT: Do you have a different view  
14 about how many to bring in and how to do that when we  
02:37PM 15 get to that stage?

16 MR. BUTNER: In terms of this 480 or 450, or  
17 50 at a time?

18 THE COURT: No, no. Once you narrow those  
19 down that don't have hardship or those that don't have a  
02:38PM 20 large amount of knowledge about the case based on  
21 pretrial publicity that they can't set aside.

22 MR. BUTNER: So --

23 THE COURT: We narrow it down from 450 to  
24 whatever, 120.

02:38PM 25 MR. BUTNER: Right.

1 THE COURT: Do you have any different notion  
2 than Mr. Sears had espoused about bringing them in, in  
3 smaller groups then, and going through individual or  
4 somewhat more individualized voir dire that would allow  
5 us to seat jurors in that fashion.

02:38PM

6 MR. SEARS: Remember, we were doing 15 a  
7 day.

8 MR. BUTNER: I don't think we need to do  
9 that. It's been my experience that we can expeditiously  
10 pick a death penalty jury a lot faster than that and  
11 without going to those very small numbers. You know, at  
12 some point in time sometimes you have to talk to some  
13 jurors individually, but by and large you don't, you  
14 don't have to do that. And it just strikes me that  
15 we're making this a lot more cumbersome, and I think I  
16 said this at the outset, a lot more cumbersome and  
17 difficult than it has to be.

02:39PM

18 THE COURT: Well, I guess I'm still open  
19 about where it goes after the questionnaire. I think  
20 the questionnaire, to the extent we have it filled out  
21 would, and have them answer questions other than  
22 hardship and publicity, would speed up the process  
23 ultimately when we get the jurors in here, because you  
24 all won't need to ask additional questions other than  
25 some wrap-up questions that, well, seeing that you were

02:40PM

1 in the military, served as an MP, have law enforcement  
2 experience after that, can you set aside those  
3 experiences and decide a case just based on the evidence  
4 presented here in court.

02:40PM

5 MR. BUTNER: Right.

6 THE COURT: Being fair to both sides?

7 MR. BUTNER: Right.

8 THE COURT: Yes, I can; or no, I can't.

02:40PM

9 MR. BUTNER: Well, Judge, I think what we've  
10 got here, though, if I can suggest, is an effort by the  
11 defense to get a lot of material on all of these  
12 potential jurors, put it into a computer, have an ideal  
13 juror in mind who is, say, not a member -- not having  
14 served in the military in the past, of a certain ethnic  
15 group, of a certain socioeconomic group, and this is the  
16 kind of person that we want on our jury.

02:40PM

17 THE COURT: Sure. And both sides would want  
18 that, I think.

02:41PM

19 MR. BUTNER: Not necessarily. Both sides  
20 aren't going to go that far and discriminate on the  
21 basis of certain things like that. And I think that,  
22 you know, if we're looking at this as a screening  
23 device, I think that we ought to be screening for the  
24 right kinds of things, the right kinds of things in this  
25 case are hardship to the potential jurors and pretrial

02:41PM

1 publicity. Those are the right kinds of things to  
2 screen for. They're not to screen for people that were  
3 in the military, or were they special ops, or did you  
4 think about going into the US Marshals Service. I mean,  
02:41PM 5 if you think those are really important questions I  
6 guess I can understand that and you can ask those in  
7 voir dire, but for screening potential jurors to come up  
8 with a 17-page questionnaire and have it full of  
9 questions like that, I don't think that's appropriate.

02:41PM 10 THE COURT: It saves asking those questions  
11 later, though.

12 MR. BUTNER: I understand, but it also  
13 allows for basically screening on the basis of factors  
14 that aren't really appropriate prior to the time of  
02:42PM 15 trial, and I don't think it's -- I don't think it's --

16 THE COURT: How does one exercise preemptory  
17 challenges unless you receive the information and then  
18 on the basis of that information make choices about who  
19 should be, you know, maybe you don't select for the  
02:42PM 20 particular jury that you want but you select against in  
21 the exercise of your preemptory challenges, or you can  
22 if you choose to use your preemptory challenges. I  
23 suppose if we didn't have preemptory challenges, then.

24 MR. BUTNER: I'm not saying we shouldn't  
02:42PM 25 have preemptory challenges but you take a look at we

1 have in here. I think a question that was highly  
2 objectionable if you have Batson considerations, okay,  
3 and I think the court's pretty much indicated that's not  
4 going to be in the questionnaire. You know, we've got  
02:42PM 5 questions about socioeconomic things. People are going  
6 to look at this and there are a number of people that  
7 are going to be very much offended by these questions.

8 THE COURT: That may also be. By the way, I  
9 saw a typo on Marshal Service, I believe has only one  
02:43PM 10 "L," page 6, question 26. Mr. Butner's comments  
11 reminded me of that.

12 MR. SEARS: You're absolutely correct, Your  
13 Honor. Just to respond in the same manner of the  
14 court's comments that the purpose of asking these  
02:43PM 15 questions in the questionnaire are simply to give us  
16 information and to allow us to focus the questions. If  
17 you look at the record of trials that I've conducted,  
18 Mr. Hammond's conducted, Ms. Chapman's conducted where  
19 questionnaires are used, the voir dire then becomes: I  
02:43PM 20 see you had a brother who was an FBI agent. Is he --  
21 then you go right to it. You just go right to the  
22 question. You don't have to ask on the court's time  
23 with the clock ticking in front of the other jurors five  
24 or six or seven questions to get that answer. You  
02:44PM 25 simply go right to the focused voir dire on that point.

1 If they don't answer, if they don't have anybody in law  
2 enforcement, you don't need to ask that juror those  
3 questions. And remember that what we had proposed was  
4 individual voir dire based on this. The 15 per day was  
02:44PM 5 an estimate of how many we thought we could get through  
6 having used a questionnaire like this to get to the 15  
7 per day. All we need is 36. We might hit 36 in three  
8 days or two days. I mean, it's possible, three days to  
9 get there, particularly if we have a lot of information  
02:44PM 10 about these people and we have made a good faith effort  
11 to exclude people for hardship, knowledge about the case  
12 and extreme attitudes about the death penalty. Or that  
13 they are -- they answer one of these other general  
14 questions in a way that would clearly disqualify them if  
02:44PM 15 they gave that same answer during judge-directed voir  
16 dire in the courtroom they said that, you know, their  
17 spouse works for the sheriff's office.

18 THE COURT: Where'd I leave off, 30.  
19 Granting your general perception and observations about  
02:45PM 20 the questionnaire, Mr. Butner, any other particular  
21 focused issues that you want me to deal with from let's  
22 go 30 to 40?

23 MR. BUTNER: I don't have any objection to  
24 those questions, sir.

02:46PM 25 THE COURT: I haven't asked, but are there

1 any additional questions up through this point that you  
2 think need to be asked that aren't phrased?

3 MR. BUTNER: No, I don't think there are  
4 additional questions. I think I've basically kind of  
02:46PM 5 stated that what I really think should be done are  
6 questions more of a screening nature rather than to the  
7 level of which these questions are asked.

8 THE COURT: I guess I'm not sure about  
9 leaving the quote at the bottom of page 8, Mr. Sears,  
02:46PM 10 with regard to the questions and that leave in, if I was  
11 a juror filling this out, I wouldn't be sure whether you  
12 were asking about my exposure as a juror to newspapers  
13 about this case or in general.

14 MR. SEARS: What if we were just to take out  
02:47PM 15 the a very famous judge once said line, and then start  
16 that paragraph with according to the attorneys expect  
17 that have you may have read, seen or heard any  
18 information about this case. I don't think that's much  
19 of a stretch.

02:47PM 20 THE COURT: No, no. The same point is there  
21 of the question on line 44: Do you read newspapers? Do  
22 you want me to answer yes, I read the Daily Courier.

23 MR. SEARS: That's --

24 THE COURT: The Arizona Republic.

02:47PM 25 MR. SEARS: The next question, yeah.



1 THE COURT: Or are you, I guess I have a  
2 little concern about the if you put in the court and the  
3 attorneys expect that you may have read, seen or heard  
4 information about this case, you're not limiting 44 to  
02:48PM 5 this case, you're asking broader questions than that,  
6 right?

7 MR. SEARS: It's an attitudinal question. I  
8 think Mr. Guastafarro, if he were here, would say that  
9 apart from the literal fact of a person reading a  
02:48PM 10 newspaper in which there may be articles about this, you  
11 learn something about people if they read newspapers,  
12 generally. People running for vice-president of the  
13 United States were asked that difficult question.

14 THE COURT: Given that I think that your  
02:48PM 15 lead-in unnecessarily restricts them to thinking about,  
16 well, this case.

17 MR. SEARS: I see your point. I see your  
18 point.

19 THE COURT: So I think I would suggest  
02:48PM 20 striking the -- all of that lead-in and just ask, you  
21 know, if you're looking for attitudinal questions and  
22 information that you just go with the questions and  
23 leave out the quote, or the highlight.

24 MR. SEARS: That's a good point, Your Honor.  
02:48PM 25 For that reason it might make sense just to take out all

1 of bold and italics there, I think we can probably live.

2 MR. BUTNER: I would prefer on behalf of the  
3 state, Judge, that that be done.

4 THE COURT: I will so order.

02:49PM

5 MR. BUTNER: So all of the bold and  
6 italicized verbiage will be removed; is that what I  
7 understand?

8 THE COURT: Yeah.

02:49PM

9 MR. SEARS: I have a suggestion that maybe  
10 where this thought comes back in is in your videotaped  
11 introductory remarks, because I don't think it's an  
12 inappropriate idea just saying in this questionnaire you  
13 will be asked at various points in the jury selection  
14 process about things that you've read or heard about  
15 this case and here's why, and sometimes you don't even  
16 -- people don't even, I mean, the point of that quote is  
17 people don't even realize that exposure to publicity may  
18 create some sort of a bias. People have asked the  
19 question: Are you a biased person, would typically say  
20 no, and then you ask more pointed questions and it turns  
21 out yes, indeed.

02:49PM

22 THE COURT: Sure.

23 MR. SEARS: Bias is not necessarily a bad  
24 thing; it's just an opinion.

02:50PM

25 THE COURT: We can do that. I'm open to

1 your suggestions --

2 MR. SEARS: Thank you.

3 THE COURT: -- for a videotaped commentary.

4 MR. SEARS: Thank you.

02:50PM

5 THE COURT: Cautioning about research, as  
6 well as how to fill these out, generally speaking.

7 MR. SEARS: Would you like to be the famous  
8 judge who said that?

9 THE COURT: No.

02:50PM

10 MR. SEARS: Okay. Just a thought.

11 THE COURT: 47, do we really need to start  
12 involving cases other than this one?

13 MR. SEARS: Let me tell you about that case,  
14 Your Honor. Mr. Guastaferrero came across this case that  
15 was covered by one of the network television programs  
16 that has expressed an interest in this trial.

02:50PM

17 THE COURT: Right.

18 MR. SEARS: And Mr. Jarka was accused of a  
19 murder, and according to the show there was very little  
20 physical evidence connecting him to the crime, yet he

02:50PM

21 was convicted. And this is one where they got to  
22 interview jurors afterwards on air and a number of them  
23 said essentially he was a bad person; he was a liar; if  
24 he lied about so many other things he must have been  
25 lying about this. We found the concept of Mr. Jarka's

02:51PM

1 case disturbing because of those comments. We saw some  
2 relationship between that case and what we have said and  
3 what we see in this case, and it ran on national media,  
4 and it wasn't all that long ago. And this is an example  
02:51PM 5 I think of what we talked about, which is it's hard to  
6 ask people about prejudicial publicity without telling  
7 them what the prejudicial publicity was. That's the  
8 reason we asked the question about Mr. Jarka's case.

9 MR. BUTNER: As you might expect, Judge, the  
02:52PM 10 state objects to questioning about an unrelated case,  
11 and also as my assistant points out to me, it invites  
12 the jurors to do some additional research once this  
13 Kelle Jarka case, I mean, it just --

14 THE COURT: More people probably know the OJ  
02:52PM 15 Simpson case. As was pointed out I think by  
16 Ms. Chapman, there's some reference to facts that dealt  
17 with that case in this prior proceeding than dealt with  
18 that case. I think we're treading dangerous waters  
19 talking about cases other than the one we're dealing in,  
02:52PM 20 although I understand the attitudinal feature you're  
21 looking for.

22 MR. SEARS: There's other voir dire that can  
23 be conducted about people who say they regularly watch  
24 television to try and drill down to: Do they watch  
02:52PM 25 these sort of 20/20, 48 Hour shows, True Crime kinds of

1 things. Years ago it used to be did you read Police  
2 Gazette and Confidential Magazine and Detective Story  
3 and things like that, that might be grounds for doing  
4 that. And another reason to do individual voir dire  
02:53PM 5 that if somebody says yeah, I never miss an  
6 opportunity -- I saw over the holidays some channel had  
7 a 20/20 marathon. They ran episode after episode.  
8 Mr. Guastaferro watched that, and that's where he got  
9 wind of some of that stuff, so there's obviously an  
02:53PM 10 appetite for that sort of information in the public  
11 someplace.

12 THE COURT: Well, I think I'd prefer you  
13 asked a broader question and then drill down if you  
14 get --

02:53PM 15 MR. SEARS: That's fine.

16 THE COURT: -- to current events.

17 MR. SEARS: And Mr. Butner's point is well  
18 taken about people encouraged to do research. We just  
19 struggled with that particular episode of that  
02:54PM 20 particular show.

21 THE COURT: And I understand the reasons why  
22 and I have heard of that case. Of 48, 49, 50, 51, all  
23 of those I think are fair and directed with regard to  
24 pretrial publicity; 52 similarly, 53, 54, 55, 56. 56,  
02:54PM 25 it doesn't say that you're asking about that, you're

1 asking about this particular case whether they've posted  
2 or blogged. I suppose in context that's what you're  
3 asking about, but it's broader than that.

4 MR. SEARS: I think, I think questions 55,  
02:55PM 5 56 --

6 THE COURT: But I don't think 56 is  
7 inappropriate. Let me finish what I was saying.

8 MR. SEARS: I'm sorry, Your Honor.

9 THE COURT: Go ahead. Go ahead.

02:55PM 10 MR. SEARS: I was going to say that what we  
11 were trying to convey in 55 and 56 were connected to 53  
12 and 54, and I don't know that we did all that artfully,  
13 because what we're asking about is, you're correct,  
14 we're asking about comments to articles written about  
02:55PM 15 this case, as opposed to some other topic.

16 THE COURT: Yeah. As I say, I don't think  
17 those are appropriate, or 58, 59, 60.

18 62 and 61 is kind of like some of your other  
19 former questions about trying to tap into some notion of  
02:56PM 20 where the jurors are coming from. 62: Do you know any  
21 of the following county attorneys, defense attorneys.  
22 Are you going to fill in those blanks, or?

23 MR. SEARS: I guess a better way to ask it:  
24 Do you know anybody in the County Attorney's office?  
02:56PM 25 There was a time when you could fill out that question

1 with three names. I was here when there were only three  
2 names from the County Attorney's office.

3 THE COURT: And there were times when I  
4 could remember who all of those were, and --

02:56PM 5 MR. SEARS: And show you where their offices  
6 were.

7 THE COURT: And the defense bar, but yeah, I  
8 think you need to draft 62 in a more broad ranging  
9 question like: Do you know any employees of the County  
02:56PM 10 Attorney's office, whether they're attorneys.

11 MR. SEARS: You could say --

12 THE COURT: Clerical staff, investigators,  
13 paralegals.

14 MR. SEARS: We could name, we could name the  
02:57PM 15 people in the courtroom here and starting with the  
16 County Attorney Sheila Polk, and do you know any of  
17 those people, anyone else or any other staff that work  
18 for the County Attorney's office, say the three of us  
19 are defense attorneys.

02:57PM 20 THE COURT: And if so, who do you know?

21 MR. SEARS: Yeah, we could do that.

22 THE COURT: You might even, well, you can  
23 leave it at that and then do follow up with whether it  
24 would have any impact and what the context is that they  
02:57PM 25 know them. Defense attorneys, I presume you're talking

1 about your group and associate law firm.

2 MR. SEARS: But I think it might be useful,  
3 now I'd imagine the state would want to know if a  
4 potential juror's best friend was a criminal defense  
02:57PM 5 attorney and who was not connected with this case.

6 THE COURT: Or my wife works at the Public  
7 Defender's office, something like that.

8 MR. SEARS: Right. I think that's covered  
9 in the earlier question about employment.

02:58PM 10 THE COURT: So, anyway, I think 62 needs  
11 some work. I don't know that you get the 64. Maybe you  
12 do. Maybe they'll see who all else came in their own  
13 little group, but if they only know who came in their  
14 own little group and don't know who came in one of the  
02:58PM 15 other groups, I guess I don't want to hear from you  
16 later that they were lying on their forum because --

17 MR. SEARS: Maybe we need one more box in 64  
18 that's who, so they can give us a name.

19 THE COURT: But I'm just thinking 64 might  
02:58PM 20 be premature for this stage of the situation since they  
21 don't know who else is --

22 MR. BUTNER: Right. I think you're likely  
23 to get a wrong answer, quite frankly.

24 THE COURT: Yeah. I guess I --

02:59PM 25 MR. SEARS: Or an early right answer.



1 THE COURT: Maybe. I don't know. So I just  
2 think it's premature.

3 MR. SEARS: Okay.

02:59PM

4 THE COURT: You could get some false  
5 negatives.

6 MR. SEARS: Okay.

03:00PM

7 THE COURT: 65, now we're dealing with legal  
8 obligations, 65, 66, 67, 68, 69, and then I think that  
9 the other general questions, 70, 71, 72 are good for  
10 trying to tell us the information that would show bias.

11 MR. SEARS: But maybe 71 and 72 also need  
12 third boxes for the what, what is your opinion.

13 THE COURT: Yeah.

14 MR. SEARS: And --

03:00PM

15 THE COURT: Or a line.

16 MR. SEARS: Yeah, a line. Okay.

03:00PM

17 THE COURT: I guess I understand, generally,  
18 the state's concerns about starting to deal with death  
19 penalty questions and a questionnaire as a screening  
20 questionnaire. I don't know that you even with the  
21 responses at the ends of the spectrum pro and con for  
22 death penalty issues that I am fairly certain that I  
23 could not -- that you could not simply exclude on the  
24 basis of the questions that are asked here that they  
25 will need some opportunity for rehabilitative follow up,

03:01PM

1 but I'm not -- I'm not convinced that it wouldn't save  
2 some time to have them fill out those things.

3 MR. SEARS: Could I speak to that, Your  
4 Honor. I've had experiences with questionnaires in  
03:01PM 5 capital cases, in particularly in federal court where  
6 these are very similar questions to these, and I may  
7 have made this point last month, but I was personally  
8 stunned at the -- at some of the responses. Most of the  
9 ones that caught my attention were the people who  
03:01PM 10 believed on one level or another that death was the only  
11 punishment. Sometimes you -- I've saved a bunch of  
12 these. I have them in a file I don't like to look at  
13 much, but I remember one answer was save the money, save  
14 the expense, take them out back and shoot them and make  
03:02PM 15 them pay for the bullet, and I'm reasonably sure that  
16 that juror could be excluded on that answer without ever  
17 having to have the juror come in and explain himself on  
18 that. And that's a real answer to a real question in a  
19 real case. And in that case we -- the case wound up  
03:02PM 20 being resolved before trial, but we were in the midst of  
21 that with Mr. Guastaferrero.

22 THE COURT: That's the reservation case?

23 MR. SEARS: Yes, sir.

24 THE COURT: That you told me about a number  
03:02PM 25 of years back?

1 MR. SEARS: 2003, yes.

2 THE COURT: I was still doing civil cases at  
3 that time.

4 MR. SEARS: And that's a good thing, and,  
03:02PM 5 but I do think questions like 76 and everything, in 2010  
6 people have opinions and they are quite often strong  
7 opinions, but I will say that you will also get opinions  
8 from people whether they're being truthful or not or  
9 whether they think if they say this they'll never get  
03:03PM 10 called, they say that I am a fill-in-the-blank for their  
11 religious or spiritual preference, I would never vote to  
12 sentence somebody to death under any circumstances, as a  
13 result, those people can't be rehabilitated. They  
14 shouldn't be. It would be a waste of time to bring them  
03:03PM 15 in.

16 I would never oppose striking somebody who  
17 answers a question like that under the current  
18 jurisprudence of the United States Supreme Court.  
19 That's why I think there really will be a number of  
03:03PM 20 people that will fit that, and you will see those  
21 answers. I promise you that if we send out 450  
22 questionnaires and get back the percentage that Margaret  
23 suggested, I promise you we will have questionnaires  
24 that have answers at those extremes, and I do believe  
03:04PM 25 that it is appropriate to look at striking those people,

1 if not by agreement, then with the Court's order based  
2 on their answers.

3 THE COURT: Well, as I said, my inclination  
4 was to leave that part of it in as a screening tool.

03:04PM 5 Any other record that you want to make, Mr. Sears?

6 MR. SEARS: How would you like, Your Honor,  
7 we can massage this questionnaire this week and come  
8 back before we leave on Friday with a new and improved  
9 version with the court's comments and matters taken out.

03:04PM 10 I think we can do that.

11 THE COURT: I don't want to stuff too much  
12 into Friday, but that would work if Thursday or Friday  
13 you could do that.

14 MR. SEARS: We can do that.

03:04PM 15 THE COURT: We still need to discuss some  
16 matters relating to the jury selection issues and how we  
17 would select from the answers that we obtain back. I  
18 think what I understand from your proposal and what  
19 Mr. Butner has said in the past, those that come through  
03:05PM 20 the first screening process would then be randomized.

21 MR. SEARS: Yes.

22 THE COURT: And put into a computer and then  
23 we would bring them in, in smaller groups, until we get  
24 the necessary numbers. I recognize that you and

03:05PM 25 Mr. Butner have a different concept of how many we need

1 to bring in and how individualized that questioning  
2 needs to be, but I think, and I guess I haven't really  
3 decided that part from my perspective. But so far, I'm  
4 correct, that that's what you would -- both sides would  
03:05PM 5 contemplate?

6 MR. SEARS: And if you recall, Your Honor,  
7 that a large part of our thinking about that was to  
8 minimize the seeing of much larger numbers of jurors,  
9 particularly jurors who have now been exposed to some  
03:06PM 10 part of this case milling around in this building, and  
11 so if you bring them in, in groups of 15 on a daily  
12 basis that, potential for that is greatly reduced and  
13 you can be more respectful of their time because you can  
14 move through that process more expeditiously so that  
03:06PM 15 people who come in on Monday in a group of let's say  
16 150, if you know you're still only going to talk to 15 a  
17 day, that means 135 of them have spent a day here  
18 milling around, come back the next day and now you're  
19 down to 120. It just gets that, and despite  
03:06PM 20 Mr. Butner's experience with doing it other ways, I have  
21 found personally, and I think it's our collective  
22 experience on this side, that this moves quickly and I  
23 think would get us a jury and avoid some of the things  
24 that could go wrong doing it in a more traditional way.  
03:07PM 25 That's why we came up with this idea.

1 THE COURT: Anything else that you want to  
2 talk about in terms of the general nature of the  
3 questions, the specific questions, objections to  
4 phraseology, other than what you've said already,  
03:07PM 5 Mr. Butner?

6 MR. BUTNER: So we haven't gone over the  
7 death penalty aspects of this questionnaire?

8 THE COURT: We haven't. If you want to go  
9 through those in a more individualized fashion.

03:07PM 10 MR. BUTNER: Are you saying, Judge, that you  
11 think that they're okay as they're presently written?

12 MR. SEARS: I'm sorry, I couldn't hear.

13 MR. BUTNER: Are you saying that you think  
14 that they're okay as they are presently written?

03:07PM 15 THE COURT: Well, I'm not saying that. I'm  
16 open to any -- hearing any comments or objections that  
17 you might have about the phraseology if we do have  
18 something in the penalty phase.

19 MR. BUTNER: Okay. Before, if I could,  
03:08PM 20 before we go to that, Mr. Sears was talking about and he  
21 keeps talking about doing 15 jurors a day. It certainly  
22 strikes me that we ought to be doing about 50 a day and  
23 I think that we could easily accomplish that,  
24 particularly if they've gone through this screening  
03:08PM 25 process with this juror questionnaire.

1 THE COURT: That I haven't decided yet in  
2 terms of the numbers and that sort of thing.

3 MR. BUTNER: I'm just hoping the court keeps  
4 an open mind about that, because I think we can get the  
03:08PM 5 jury picked a lot more expeditiously if we use those  
6 kinds of numbers, Judge.

7 THE COURT: Yeah, or if not 50, at least  
8 what would represent a full panel.

9 MR. BUTNER: Right.

03:08PM 10 THE COURT: Yeah. I'm -- I'm, I haven't  
11 decided that part of things yet.

12 MR. BUTNER: Okay.

13 THE COURT: I recognize the countervailing  
14 arguments.

03:08PM 15 MR. SEARS: I would just point out, Your  
16 Honor, that the judge that presided over the last  
17 capital trial I did in federal court started out with a  
18 belief that we could do 50 per day and the record would  
19 show that after a couple of days that was cut in half  
03:09PM 20 and cut in half again, and the remainder of the jury  
21 selection process was hitting about 11 or 12 per day.

22 We had a questionnaire in that case and we had  
23 individual voir dire. What was a particular problem in  
24 that case that lengthened the process I think a bit was  
03:09PM 25 that we didn't come to a meeting of the minds, and when

03:09PM

1 I say that, the defense and the judge in that case,  
2 about what proper questioning was in the questionnaire  
3 and we spent about an hour a day for the first eight or  
4 nine days wrangling about what kinds of questions we  
5 could ask in voir dire, and in hindsight that would have  
6 been something much more suited for this kind of  
7 conversation months in advance about hypothetical  
8 questions and about questions about can you imagine this  
9 or can you imagine that. And I can remember very

03:10PM

10 clearly an interchange where the judge said I couldn't  
11 ask the jury if they could imagine something, and I had  
12 to get them adequately pointed to the questionnaire she  
13 had approved where the jurors were asked could you  
14 imagine something, and so we spent time doing that. I

03:10PM

15 think one of the problems was that was the first capital  
16 case in the district since the reinstatement of the  
17 death penalty case and there were a lot of things about  
18 it that were unusual and different. I do think we can  
19 move more quickly here, but I think if we got larger  
20 groups in a courtroom we could lose the benefit of  
21 having smaller groups more focused and run afoul of the  
22 concerns about group interaction and respecting the  
23 jurors' time as we try to fold into this process.

03:10PM

03:11PM

24 THE COURT: Do you have any can-you-imagine  
25 questions in this?



1 MR. SEARS: No, I wouldn't ask that.

2 THE COURT: Glad to hear it.

3 MR. SEARS: We have a question No. 73 asks  
4 any-reason-you-can-think-of question. That's not a  
03:11PM 5 can-you-imagine question, but it is a critically  
6 important attitudinal question about the death penalty  
7 in this case. And that is borne from collective  
8 experience from Mr. Guastaferrero and all of us that when  
9 you are talking with people about their attitudes of the  
03:11PM 10 death penalty, Mr. Butner added in this regard jurors  
11 may see the questionnaire and when they get into a more  
12 focused questions about the death penalty, for example,  
13 I have been in cases in which prosecutors will attempt  
14 to rehabilitate or defense attorneys will attempt to  
03:12PM 15 rehabilitate people who say they can't oppose the death  
16 penalty by saying what about this case, what about this  
17 defendant. There's a group of them they always mention.  
18 It's always Timothy McVeigh and Ted Bundy and those  
19 people, and jurors get drawn back into, well, okay, now  
03:12PM 20 that you mention it I suppose I could think of that, or  
21 I could think of something else. The same token if  
22 jurors say there's no mitigation that you could present  
23 to me that would ever cause me to vote for something  
24 other than death for first degree murder, it's a  
03:12PM 25 critical attitudinal question about going into voir

1     dire. It may not be a question that may exclude  
2     somebody, but it may be part of that process. If a  
3     person says I'm an automatic believer in the death  
4     penalty, it's an automatic sentence, it's the only  
03:12PM 5     sentence and there's nothing you could ever tell me  
6     about death penalty that would cause me to change that  
7     view, that's very important to know and it may very well  
8     make that person excludable at the top.

9             THE COURT: Given that, Mr. Butner, do you  
03:13PM 10     want to go through the questions and tell me what  
11     objections you have to specific questions if a general  
12     penalty phase set of questions is asked for screening  
13     purposes?

14             MR. BUTNER: Well, starting with question  
03:13PM 15     No. 73, Judge, we're talking about in the event that  
16     defendant is found guilty of first degree murder here,  
17     and I think that what we have is a much more kind of  
18     a -- probably more biased way of writing that question.  
19     And I would suggest that the language on our part of it,  
03:13PM 20     it's all in red where it says if we reach the second  
21     phase of this trial it will be because you and your  
22     fellow jurors unanimously found Mr. Democker guilty. I  
23     would suggest that probably a better way to put that  
24     would be if the defendant is found guilty of first  
03:14PM 25     degree murder, the prosecution then has the burden of

1 proving beyond a reasonable doubt that there is at least  
2 one aggravating factor which would allow the jury to  
3 consider the death penalty, da, da, da, da. I think  
4 that's more appropriate language.

03:14PM

5 THE COURT: The da, da, da, do you have any  
6 objection to the last sentence?

7 MR. BUTNER: I do. If you are chosen a  
8 juror in this case, is there any reason you could think  
9 of why you would not be able to . . .

03:14PM

10 THE COURT: Why don't I do this, rather than  
11 going through them individually, if you have a draft of  
12 proposed changes on the penalty phase, since we still  
13 have to argue that motion that I think Mr. Hammond is  
14 taking up, why don't -- why don't you burn me a copy of  
15 that and Mr. Sears a copy of that for what alternative  
16 language you would put in there for the penalty phase.

03:15PM

17 MR. BUTNER: And so we're talking about 73  
18 through?

19 THE COURT: Yeah, basically, it's all of  
20 the --

03:15PM

21 MR. BUTNER: Remainder.

22 THE COURT: The remainder, except for the  
23 last question or two.

24 MR. SEARS: 73 through 95; is that right?  
25 Or 73 through 94?

03:15PM

1 THE COURT: 94, yeah.

2 MR. SEARS: 94.

3 MR. BUTNER: And when are we going to come  
4 back to this, Judge?

03:15PM

5 THE COURT: Well, the proposal for  
6 Mr. Hammond's matter I think was actually tomorrow, or  
7 maybe that's Ms. Chapman. I don't know which one of the  
8 two. It has both. That was one Hammond would do, the  
9 qualification of the jury.

03:16PM

10 MR. BUTNER: So tomorrow?

11 THE COURT: The alternative proposal for a  
12 second juror. If you can, yeah, if we can get to that  
13 after we discuss that motion.

14 MR. SEARS: I had a thought, and we had sent  
03:16PM 15 our version of the questionnaire to the state in  
16 Microsoft Word so they could edit, which I see they've  
17 done, maybe we're at the point now where both sides  
18 could do that where it would make it easier for the  
19 Court to adopt and modify that and if you want we could  
03:16PM 20 e-mail that to Robin.

21 THE COURT: If you would e-mail your  
22 proposals back to Mr. Sears on modifying the death  
23 penalty so that whoever has it would have both, if you  
24 already have it done to some extent, so it would be --

03:17PM

25 MR. SEARS: I was thinking we could also

1 e-mail them to Robin so that she would have them. If we  
2 made decisions she would be the person most likely to  
3 prepare the final document. She said she didn't have  
4 enough to do and she asked me for some more assignments.

03:17PM

5 THE COURT: That's what I'm looking for you  
6 or Mr. Butner to do. Yeah, I don't have any problem if  
7 you e-mail them to Robin.

8 MR. SEARS: Thank you.

03:17PM

9 THE COURT: Not conceding that it won't have  
10 the two sides to it. Do you need a break?

11 MR. SEARS: Actually, Your Honor, I know you  
12 asked staff first, I could probably use five minutes,  
13 Your Honor.

14 THE COURT: Let's take five minutes.

03:18PM

15 (A recess was taken)

16 THE COURT: The record reflect the lawyers  
17 and defendant still present. I did have Phil copy off  
18 for you the jury questionnaire that goes out originally  
19 to the jurors just so that you know what's on that. It

03:32PM

20 doesn't have anything that pertains to ethnicity any  
21 more. Maybe they had someone send in concerns about  
22 that issue. Nonetheless, that may help you with what  
23 information they gather normally for purposes of the  
24 jury selection. I think it's much more limited than  
25 what we used to receive ten, fifteen years ago.

03:33PM

1 Mr. Sears.

2 MR. SEARS: Would it be possible for both  
3 sides in this case to get this questionnaire at the time  
4 for each of the 450 people?

03:33PM

5 THE COURT: Don't know. I can check, see  
6 what the issues are with regard to the Jury  
7 Commissioner's office.

03:33PM

8 MR. SEARS: Limited to use for the purpose  
9 of jury selection only, except as required by Arizona  
10 Revised Statutes. I don't know. I just think it would  
11 be useful to have this on top of, in addition to the  
12 questionnaire answers, and frankly I'm not sure why I've  
13 never asked for this before.

03:34PM

14 THE COURT: Well, they give you a certain  
15 amount of that information on the sheets when you do a  
16 jury selection.

17 MR. SEARS: Well, I guess the answer is,  
18 though, that --

03:34PM

19 THE COURT: Not in that form. It's in a  
20 computerized.

03:34PM

21 MR. SEARS: Sure, sure. The hardship stuff  
22 is interesting because it might be important to know if  
23 somebody filled this questionnaire out, asked for a  
24 hardship excuse, it wasn't granted and is in the pool,  
25 but I guess they would repeat the same information in

1 the questionnaire as well.

2 THE COURT: One hopes.

3 MR. SEARS: Yeah. Anyway, is that something  
4 we could take up at another point about?

03:34PM

5 THE COURT: Oh, I suppose. I don't want to  
6 add too much copying burdens on the folks and because  
7 some of the same information is, I mean, most if not all  
8 of the same information is contained in your  
9 questionnaire. If I'm going to do another jury

03:35PM

10 questionnaire and have them fill it out, I'm probably  
11 going to make them perturbed about filling out the same  
12 information twice, but I think the answers on your  
13 questionnaire are going to be more pertinent than this  
14 indicates.

03:35PM

15 MR. SEARS: Sure. If I understand from what  
16 Margaret was telling us last month, though, was that  
17 this is the jury questionnaire at the beginning of their  
18 service.

19 THE COURT: That's my understanding.

03:35PM

20 MR. SEARS: That they use to create a  
21 database for all of the thousands of people that come in  
22 and to make the, you know, I'm not a US citizen, I'm not  
23 a resident of the county, I've been declared mentally  
24 incompetent, whatever the answers are there.

03:36PM

25 THE COURT: I agree. I think that's what

1 the questions are.

2 MR. SEARS: Thank you, Your Honor.

3 THE COURT: So I think where we left off,  
4 we're going to have each side give me what modification,  
03:36PM 5 suggestions, you have, and we'll continue the discussion  
6 about the jury questionnaire probably tomorrow.

7 I have about 20 minutes left before I have  
8 to go to my other meeting and before 4 o'clock, so if  
9 there's something you think that's more compact that'll  
03:36PM 10 fit in that space of the remaining things you have. We  
11 have a couple I think that look probably a bit shorter,  
12 the police officers No. 3, and Echols No. 4.

13 MR. SEARS: Yeah, maybe No. 3. Ms. Chapman  
14 would speak to that, Your Honor, see if we can't get  
03:37PM 15 that in before you have to leave.

16 THE COURT: Hold that one off. That's in  
17 reference to a motion *in limine* filed by the defense on  
18 December 18th requesting the Court order excluding  
19 police officers from testifying as experts in particular  
03:37PM 20 fields other than law enforcement field. State  
21 responded on January 4th. I received a defense reply on  
22 January 5th. Ms. Chapman.

23 MS. CHAPMAN: Your Honor, as I understand  
24 the state's response, they only intend to offer law  
03:37PM 25 enforcement testimony under Rule 701, so given that



1 response I think it would be appropriate for the Court  
2 to enter an order granting the motion and prohibiting  
3 the state from offering testimony from those officers on  
4 areas involving scientific, technical or other  
03:38PM 5 specialized knowledge which would be properly handled  
6 under Rule 702.

7 THE COURT: Yeah, my understanding of the  
8 state's response is that you have experts that are going  
9 to talk about particular areas of scientific expertise,  
03:38PM 10 including things like lab folks and that based on the  
11 response then I would grant the motion *in limine*.

12 MR. BUTNER: But just to clarify from our  
13 end --

14 THE COURT: With the clarification, as I  
03:38PM 15 understand your position, that things that are  
16 observational that don't need expertise they would be  
17 asked to testify about.

18 MS. CHAPMAN: I'm sorry, Your Honor, the  
19 only thing I would add to that, as long as it's within  
03:38PM 20 that witness's personal observation, which is right --

21 THE COURT: Yeah, I understand that  
22 aspiration. Mr. Butner.

23 MR. BUTNER: I'm trying to ascertain exactly  
24 what we're talking about here. Of course I don't want  
03:39PM 25 police officers testifying as experts, but that doesn't

1 mean that because there's an expert in a certain kind of  
2 a field, for example, comparison of tire treads that a  
3 police officer can't testify that, well, I looked down  
4 and it looked exactly the same to me. He's of course

03:39PM

5 susceptible to cross examination. You're not an expert,  
6 are you? No, I'm not. You know, and so on and so  
7 forth, and I think that that may be what the defense is  
8 seeking to preclude because there are certain witnesses  
9 that will say: Hey, I took a tire out there from

03:39PM

10 Mr. Democker's bike and I put it next to the tire treads  
11 in the dirt and they looked exactly the same to me.

12 MS. CHAPMAN: And your -- go ahead.

13 MR. BUTNER: We have obtained information  
14 from an expert in that field who said that you can't

03:39PM

15 even provide me with good enough photographs that I can  
16 render an opinion about this stuff. I mean, that's in  
17 summary, you know, which is unfortunate from the state's  
18 point of view, I would suggest, and possibly even from  
19 the defense, but that is the state of affairs. We have  
20 people that actually saw those prints and so forth,  
21 though, and they can testify as to what they saw.

03:40PM

22 MS. CHAPMAN: And Your Honor, that is --

23 THE COURT: I think we're on the same page,  
24 but let me make sure with the defense counsel.

03:40PM

25 MS. CHAPMAN: Well, Your Honor, that is

1 precisely the kind of testimony we think that is  
2 prohibited under 702 for a non-expert, and the bike tire  
3 comparison is a good example because the DPS report that  
4 the state received from the DPS expert was that you  
03:40PM 5 couldn't make any comparison because of the quality of  
6 the pictures, and I know we have a Willits motion with  
7 respect to that that you'll hear tomorrow or Thursday,  
8 but bike tire comparison is a matter of specialized  
9 knowledge.

03:40PM 10 We've provided Your Honor as an attachment  
11 to the Willits motion a 21-page DPS protocol for making  
12 that kind of comparison. Now, the fact that Sergeant  
13 Winslow thinks the bike tires are a match, it's not --  
14 that is a matter of specialized -- that is a matter of  
03:41PM 15 specialized knowledge. He's not qualified, at least as  
16 far as we've been told or demonstrated in his interview,  
17 to make bike tire comparisons.

18 THE COURT: What if he testified that they  
19 looked similar to me observing them side by side or  
03:41PM 20 something like that? Is that not something that's 701  
21 allowable, testifying that they're a match is what's  
22 calling for an expert opinion so it depends on the  
23 language that he's asked to use as though -- as to  
24 whether it's prohibited or not.

03:41PM 25 MS. CHAPMAN: Well, there are two issues

1 with that, Your Honor. One certainly calling it a match  
2 is what he did when Officer Brown presented his  
3 testimony.

4 THE COURT: Yeah, and in my opinion that  
03:41PM 5 would be an expert opinion that would be prohibited to  
6 somebody that's a layman rendering that kind of opinion,  
7 and I think we're on the same page with regard to use of  
8 that particular verbiage.

9 MS. CHAPMAN: That's right. But Your Honor,  
03:42PM 10 I would also suggest that him offering a comparison that  
11 they look similar or consistent or any comparison of the  
12 tire tracks themselves, particularly in light of the  
13 fact that we don't -- we're not able to make those  
14 comparisons because of the photographs that were taken  
03:42PM 15 and particularly in light of the 21-page protocol for  
16 making that determination if he doesn't have any  
17 qualification, training or experience in looking at tire  
18 tracks, then his opinion that they look similar is not  
19 helpful to the jury. The jury can look at photographs  
03:42PM 20 and make whatever determination they want, if the Court  
21 decides to permit those photographs as relevant  
22 evidence. But you know, lay testimony has to be based  
23 on an individual perception and it has to be helpful to  
24 the jury, and to the extent that Mr. Winslow or Officer  
03:42PM 25 Winslow doesn't have any expertise or training in bike

1   tire comparison, he's not qualified nor has he been  
2   offered as an expert to do that, and that's precisely  
3   the kind of testimony that should be prohibited.

4                   The question is does that -- is that a  
03:43PM 5   matter that requires specialized training. Is comparing  
6   bike tires a matter that requires specialized training.  
7   I think if Your Honor looks at the DPS protocol which  
8   connects the lab technicians and scientists that are  
9   making those comparisons within DPS, I think it's pretty  
03:43PM 10   obvious that is a matter that requires specialized  
11   knowledge. To the extent it does not require  
12   specialized knowledge, Winslow's testimony is not  
13   helpful to the jury in making that decision under 701,  
14   and there are several other items.

03:43PM 15                   THE COURT: Yeah. Well, I guess my ruling  
16   has to be, because I understand what language has been  
17   used, but in terms of what language could be used I  
18   guess they're somewhat limitless words that could be  
19   used. I will grant the motion with regard to expert  
03:43PM 20   testimony. They haven't been disclosed as --

21                   MR. BUTNER: Judge.

22                   THE COURT: Let me finish what I was going  
23   to say. They haven't been disclosed as experts, but I  
24   think that there is allowable language to some purposes  
03:44PM 25   about what was observed, why they did what they did;

1 took photographs because they looked similar to me,  
2 that's why I took the photographs; I'm a crummy  
3 photographer. You know, to the -- so to the extent that  
4 photographs were taken that weren't very good, he's  
03:44PM 5 liable to be impeached with regard to the quality of  
6 that sort of thing, but generally lay witnesses can  
7 testify as to what they perceive under 701, and I agree  
8 with you, it has to be relevant and bear some purpose  
9 toward a determination that a person is guilty or not  
03:44PM 10 guilty or that some evidence has value in the case for  
11 this reason or that, but I --

12 MS. CHAPMAN: Your Honor.

13 THE COURT: -- other than making some  
14 general observation that they haven't been disclosed as  
03:45PM 15 experts with regard to particular fields, I grant that.  
16 I will grant that motion *in limine*, that they haven't  
17 been disclosed as experts and can't testify as to areas  
18 that require expertise. But in terms of observations of  
19 what they did, I think you're --

03:45PM 20 MR. BUTNER: Judge, if I might.

21 MS. CHAPMAN: Your Honor.

22 THE COURT: I can't hamstring the other side  
23 or your side, for that matter, in terms of what  
24 observations were made. Mr. Butner.

03:45PM 25 MR. BUTNER: Judge, I think it's, in

1 essence, it's all about foundation here. And when you  
2 put a detective sergeant like Detective Sergeant Dan  
3 Winslow on the stand, the foundation that I have for him  
4 is that he's a lay witness under Rule 701. He's not  
03:45PM 5 testifying as an expert, and I can ask him those kinds  
6 of questions, and I will. You're not an expert on tire  
7 prints or anything, are you, Detective Winslow? No, I'm  
8 not, Mr. Butner. Were you out at the scene? Yes, I  
9 was, da, da, da da. And did you compare the tire tracks  
03:46PM 10 from Mr. Democker's bike tire to the tire tracks that  
11 were in the dirt out there adjacent to the scene of this  
12 incident? Yes, I did. And what did you see? Well, I  
13 saw that they looked identical to me.

14 THE COURT: I think saying the word  
03:46PM 15 "identical" is attributing to him a level of expertise  
16 that he doesn't have.

17 MR. BUTNER: Judge, I think that's really  
18 wrong. I think he can use those words. That's his  
19 perception. That doesn't mean he's testifying as an  
03:46PM 20 expert and he's not going to be offered as an expert,  
21 but that's what he has consistently said, he put those  
22 prints down, he rolled them through the dirt and they  
23 appeared identical to him. Is he an expert? No. Is he  
24 susceptible to cross examination on that basis? Yes.  
03:46PM 25 Is he offered as an expert? No.

1           The foundation before he even testifies will  
2   be that he's not an expert on that, but to take the  
3   words away from him that came out of his report and were  
4   his views as a lay person, I don't think that that's  
5   proper, Judge. It'd be a different story if we were  
6   offering an expert on that basis, and maybe the defense  
7   wants to do that. We aren't able to do that.

8           MS. CHAPMAN: Your Honor, the issue is not  
9   how the testimony is labeled. The issue is what is the  
10   qualification of the witness and what kind of testimony  
11   is being offered. If it's not -- the perception of the  
12   officer, "I took the photos," he can testify that he  
13   took photos, if it's relevant. I don't think why he  
14   took photos is relevant, and certainly in any opinions  
15   he has about whether those tire tracks match or why they  
16   match or how they match, that is a matter of expertise.

17           Mr. Butner has received expert reports on  
18   that issue with different language in them than the  
19   language that Sergeant Winslow uses, and Sergeant  
20   Winslow is not qualified to use that language or make  
21   those opinions. And we cited to Your Honor the National  
22   Academy of Sciences report that reflects that this kind  
23   of testimony is particularly troubling because the  
24   language that's used tends to mislead and confuse  
25   juries, particularly when it's given importance that it



1 doesn't have. And Sergeant Winslow's opinions about  
2 whether tire tracks match is simply not relevant and  
3 he's not qualified to answer that kind of question.

4 And Your Honor, I mean, we're talking about  
03:48PM 5 tire track comparison, but the state has also offered  
6 officer testimony on DNA and forensic pathology and shoe  
7 print comparison and psychology and a whole host of  
8 other areas that fall properly within the purview of  
9 702, and trying to get that information in the back door  
03:48PM 10 by calling it a lay person's perception is not what the  
11 rule contemplates and shouldn't be permitted. And the  
12 fact that this is what's continued to happen in  
13 particular with this example of Sergeant Winslow  
14 demonstrates how it puts us in an unfair position. The  
03:48PM 15 DPS report says I can't make any conclusions, so  
16 Sergeant Winslow's perception or opinion that it matches  
17 is not relevant and he's not qualified to make it, and  
18 all of those other areas.

19 THE COURT: I agree with that observation  
03:49PM 20 that he has not been listed as an expert. I don't  
21 believe that he can make a conclusion that they were  
22 identical, and so to that extent I think he can offer  
23 testimony as to what his perceptions were. But I agree  
24 that he or other officers or lay witnesses that are not  
03:49PM 25 experts in their respective fields cannot testify under

1 the Rules of Evidence with regard to issues that are  
2 properly subject to expert opinion.

3 MS. CHAPMAN: I guess as a matter of drawing  
4 a line somewhere in my view it's a difference between  
03:49PM 5 what you perceive, what you saw and drawing an opinion  
6 from it and a conclusion from it, and a conclusion that  
7 requires knowledge, skill, training or experience that  
8 these officers don't have as non-experts. So I think  
9 that would be a clear way to prepare the order and  
03:49PM 10 advise the state about what's permissible and not  
11 permissible.

12 MR. BUTNER: So just to clarify, Judge,  
13 Officer Winslow, Detective Sergeant Winslow out there at  
14 the scene, rolls the tire tread and the dirt beside the  
03:50PM 15 tire treads that are already present, looks at the two  
16 tire treads and from his lay point of view says they  
17 appear identical to me, are you ruling that he cannot  
18 offer that observation?

19 THE COURT: Now, I don't think he can  
03:50PM 20 testify to the conclusion that they are identical or  
21 that they, quote, match, closed quote.

22 MR. BUTNER: I don't think, that is not what  
23 I said. I said they appeared identical to me. That's  
24 different than saying they are identical. In fact, we  
03:50PM 25 consulted with the DPS expert and we have to do all

1 kinds of things in order for him to go through the  
2 testing process and comparison process before he's able  
3 to offer such an opinion.

4 THE COURT: Well, I'm --

03:51PM

5 MR. BUTNER: This is a lay witness saying  
6 that it appeared identical to him.

7 THE COURT: I share the concern that the  
8 defense has with regard to that about it therefore  
9 lending some degree of servitude that it doesn't

03:51PM

10 warrant, and I think that's what the concern is with  
11 Rule 702, so and to that extent it's misleading.

12 MR. BUTNER: Judge, I think in looking at  
13 the rule, I think it's clearly contemplated within Rule  
14 701 that the witness's testimony in the form of opinions  
15 or inferences is limited to those opinions or inferences  
16 which are rationally based on perception of the witness  
17 and helpful to a clear understanding of the witness's  
18 testimony or the determination of a fact in issue. It  
19 seems to me that a simple statement like that by a  
20 detective who does not present himself to be an expert  
21 is helpful for the jury and certainly within his  
22 perception as a lay witness not testifying as an expert.

03:51PM

23 MS. CHAPMAN: Your Honor.

24 THE COURT: As I say, I think it's the  
25 conclusion that's drawn and it depends in large extent

03:52PM

1 on what the verbiage is that's used. If he uses things  
2 like "match" or "identity," then that's lending a level  
3 of servitude that he's not qualified to render. If it's  
4 -- if it's "it appeared similar, here's why I thought it  
03:52PM 5 was similar," describe, you know.

6 MS. CHAPMAN: Your Honor.

7 THE COURT: On balance then I think that 701  
8 applies. It's a line.

9 MS. CHAPMAN: And Your Honor, I just, I want  
03:52PM 10 to be clear that our objection is to that conclusion at  
11 all. I think that the rule says --

12 THE COURT: I understand. I understand.

13 MS. CHAPMAN: -- it's an opinion or  
14 inference. It's a perception or an inference, and the  
03:53PM 15 idea is that you limit lay witnesses to what they see,  
16 what they perceive, and that expert witnesses then offer  
17 opinions because they're trained to offer those opinions  
18 that require knowledge that goes beyond what's  
19 perceived. And if these witnesses are only going to  
03:53PM 20 testify about what they perceive, then drawing  
21 conclusions about what they perceive in matters that  
22 require 21 pages of DPS protocol is not appropriate  
23 under Rule 701, and that applies to all the other areas.  
24 You know, we've heard testimony from officers about  
03:53PM 25 materials resilience, about psychology, and blood

1 spatter all of those areas, and, Your Honor, we have a  
2 legitimate I think fear, and I don't want to skirt this  
3 issue by having the state say we're just going to call  
4 all these people lay witnesses, because we have real  
03:53PM 5 concerns about the way this evidence was presented to  
6 both grand juries. That's why this case was remanded  
7 the first time. I don't think these opinions, even the  
8 opinions they appear similar, I don't think that's  
9 contemplated by 701. That's not rationally based on his  
03:54PM 10 perception; that's drawing conclusion.

11 THE COURT: I disagree with that. So, and  
12 maybe it's a fine line that I'm drawing, but I think  
13 that you can have 701 testimony from officers and other  
14 lay people who observed whatever it is that they  
03:54PM 15 observed and can tell the jury about what they perceive.  
16 But I don't think that you can draw conclusions about  
17 identity or matches or other things in the same vein  
18 that require specialized training and expertise, and I  
19 think it ultimately comes down to the, to some extent,  
03:54PM 20 the fact that you can't have definitive conclusions  
21 based on lay people saying what they saw. And to the  
22 extent that we're talking about psychology, it applies  
23 there. To the extent that we had, and that's -- may  
24 have had an expert in accounting render opinions about  
03:55PM 25 things that were not in an accounting field or blood

1 spatter sorts of -- sorts of things, I think it applies  
2 across the board to those. So I don't know how to draw  
3 the line any better and would require that if they're  
4 getting overboard with the defense asserting an  
03:55PM 5 objection, I believe we can discuss it.

6 MS. CHAPMAN: Well, Your Honor, one  
7 suggestion we didn't make in the motion but I believe  
8 I'd like to have would be to have the state identify  
9 what opinions that they've outlined that they've  
03:55PM 10 previously offered from these specific officers they  
11 intend to offer at trial, because I think precisely  
12 looking at this Winslow issue and drawing these lines  
13 once Sergeant Winslow gets on the stand and says: I  
14 finds it's a match, it is what it is.

03:56PM 15 THE COURT: Closing the barn door after the  
16 horse is out.

17 MR. BUTNER: Finding that it's a match is  
18 different than saying it appeared to be identical to me.  
19 Typically, a finding of a match is something along the  
03:56PM 20 lines of a DNA comparison or something that is  
21 scientific in nature like that. With the foundation  
22 being laid that the officer is a detective sergeant and  
23 not an expert on tire treads, him rolling a tire tread  
24 in the dirt beside another tire tread and saying they  
03:56PM 25 appear to be identical to me, that's the kind of

1 perception that any lay witness can make, and that's all  
2 we're offering him for, Judge. I just want to make it  
3 clear on the record that that's the position of the  
4 state on this. That's the proffer, if you will, of the  
03:56PM 5 evidence on this that particular issue. I think that's  
6 significantly different than some of the other examples  
7 pointed out by the defense in this motion.

8 MS. CHAPMAN: And Your Honor, I just want to  
9 reiterate part of the rationale. I think that this  
03:57PM 10 distinction is a difficult one, and we do need to  
11 carefully draw these lines. But part of the rationale  
12 for the difference between 701 and 702 is that members  
13 of the jury are equally qualified as a lay witness to  
14 draw opinions and conclusions based on what a witness  
03:57PM 15 perceived and perceives. That's why a lay witness like  
16 Winslow shouldn't be offering --

17 THE COURT: If they have the same  
18 qualification.

19 MS. CHAPMAN: -- opinions.

03:57PM 20 THE COURT: I, pardon the interruption. I  
21 think the difficulty is they don't have the same  
22 information or may not have the same information that  
23 the percipient witness had at the time.

24 MS. CHAPMAN: So with respect to Sergeant  
03:57PM 25 Winslow, that's why the Willits instruction becomes

1 relevant. But with respect --

2 THE COURT: It does.

3 MS. CHAPMAN: With respect to other issues  
4 in terms of a witness describing what they've perceived,  
03:57PM 5 if they are a lay witness the presumption is that a  
6 jury's as qualified as a lay witness to draw those  
7 conclusions. So other than with respect to this bike  
8 tire track, which we don't have because the state didn't  
9 preserve it appropriately, these, with respect to these  
03:58PM 10 other matters the jury should have the same ability to  
11 draw whatever conclusions can be drawn based on  
12 perception without any witnesses offering any  
13 conclusions, and that's the limit of 701.

14 THE COURT: All right. I guess if to the  
03:58PM 15 extent that you can identify or the state can identify  
16 particular other areas of concern, we can address some  
17 of those at the beginning of tomorrow's session. I need  
18 to take a break and get to my meeting. We'll resume at  
19 9 o'clock in the morning.

03:59PM 20 (Proceedings adjourned at 3:59 p.m.)

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## C E R T I F I C A T E

STATE OF ARIZONA )  
COUNTY OF YAVAPAI ) ss  
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I, Holly M. Draper, certify that I am an Official Court Reporter for the Superior Court of Yavapai County, State of Arizona; that I was present and took down in shorthand all proceedings had in the above-entitled matter, and that the foregoing 88 pages contain a full, true and correct transcription of my shorthand notes so taken.

WITNESS my hand this 1st day of February, 2010.

*Holly M. Draper*

Holly M. Draper, RPR  
Arizona CR #50744